TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 140.

THE FIRE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

DAVID WRIGHT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 16, 1885.

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a UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States of America for the southern district of Illinois, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois, before you, between David Wright, plaintiff, and The Fire Association of Philadelphia, defendant, a manifest error hath happened, to the great damage of the said defendant, The Fire Association of Philadelphia, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have
b the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this second day of July, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and tenth year.

{ The seal of the Circuit Court of the United States for the South'n Dist. Ill. }

J. A. JONES,
Clerk Circuit Court U. S., South. Dist. Ills.

Filed July 2nd, 1885.

J. A. JONES, *Clerk.*

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, on Monday, the second day of February, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and ninth year, before the Hon. Samuel H. Treat, district judge of said district, and in the absence of the Hon. Walter Q. Gresham, judge of the seventh judicial circuit, *pro tempore* sole judge of said circuit court.

J. A. JONES, *Clerk.*

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

DAVID WRIGHT
vs.
THE FIRE ASSOCIATION OF PHILADELPHIA.

Assumpsit.

Be it remembered that heretofore, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand eight hundred and eighty-two, came The Fire Association of Philadelphia, defendant, by Messrs Palmer & Phillips, its attorneys, and
2 filed in the clerk's office of said circuit court of the United States a certified transcript from the circuit court of Greene county, Illinois, in a certain cause wherein David Wright, a citizen of the southern district of the State of Illinois, is plaintiff, and The Fire Association of Philadelphia is defendant, which said certified transcript is in the words and figures following, to wit:

Certified Transcript from the Circuit Court of Greene County, Ill's.

UNITED STATES OF AMERICA, }
State of Illinois, Greene County, } *ss:*

In Circuit Court. September Term, A. D. 1882.

Pleas before the Honorable Cyrus Epler, one of the judges of the 7th judicial circuit of the State of Illinois and sole presiding judge of the circuit court of Greene county, in the State aforesaid, and at a term thereof begun and held at the court-house, in the city of Carrollton, in said county, on the first Monday (being the fourth day) of September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the said United States the one hundred and seventh.

Present: Honorable Cyrus Epler, judge of the 7th judicial
3 circuit of the State of Illinois; T. J. Albert, clerk; David F. King, State's attorney; Geo. W. Witt, sheriff.

Attest: T. J. ALBERT, *Clerk.*

Copy of Precipe for Summons.

STATE OF ILLINOIS, }
Greene County, } *ss:*

In the Circuit Court. To September Term, 1882.

DAVID WRIGHT
v.
THE FIRE ASSOCIATION OF PHILADELPHIA, Pennsylvania.

Assumpsit. $15,000.

To Thomas J. Albert, circuit clerk:

Please issue summons in the above cause for the above amount

returnable to the September term, 1882, directed to the sheriff of Greene county, serve, etc.

CHARLES D. HODGES AND
JAMES R. WARD,
Attorneys for Plaintiff.

Copy of Summons.

STATE OF ILLINOIS, } ss:
Greene County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

4 We command you that you summon The Fire Association of Philadelphia, Pennsylvania, if they shall be found in your county, to appear before the judge of the circuit court, on the first day of the next term, to be holden at the court-house in Carrolton, within and for the county of Greene, on the first Monday of September next, to answer unto David Wright in plea of assumpsit in the sum of fifteen thousand dollars ($15,000), and of this writ make legal service and due return at the time and place aforesaid.

Witness Thomas J. Albert, clerk of our said circuit court at Carrollton this 28th day of July, in the year of our Lord one thousand eight hundred and eighty-two, the seal of said court being hereunto affixed.

[SEAL.] T. J. ALBERT, *Clerk.*

STATE OF ILLINOIS, } ss:
Greene County, }

I return the within writ duly served upon the within named defendant company by leaving a true copy thereof with Messrs. Barnett & Carrington, agents of said company, residing in said

5 Greene county, the president, clerk, secretary, superintendent, general agent, cashier, principal directors of said defendant, company not found in my county, this 31st day of July, 1882.

GEO. W. WITT, *Sheriff,*
By JOHN G. F.POWELL, *Deputy.*

Copy of Declaration.

STATE OF ILLINOIS, } ss:
Greene County, }

In the Circuit Court, September Term, 1882.

DAVID WRIGHT,
vs.
THE FIRE ASSOCIATION OF PHILADELPHIA.

Assumpsit.

David Wright, who is a resident of said Greene county, complains, by James R. Ward and Charles D. Hodges, his attorneys, of The

Fire Association of Philadelphia, defendant, of a plea of assumpsit, for that whereas the defendant on, to wit, the 11th day of July, A. D. 1881, in the city of Las Vegas, in the Territory of New Mexico, to wit, at the city of Philadelphia, in the State of Pennsylvania, made and delivered its policy of insurance to the plaintiff, and thereby then and there, in consideration of the sum of one
6 hundred and fifty dollars, paid by the plaintiff to the defendant, did then and there insure the plaintiff against and from loss or damage by fire to the amount of five thousand dollars, on certain property of the plaintiff, to wit, $2,500.00 on the two-story adobe and wood stuccoed, shingle-roofed hotel building to be occupied for hotel porposes, $2,500.00 on the frame-stuccoed two-story shingle-roofed dining-hall building (26x41), with one-story stuccoed ell (19x26) or kitchen building, situated about five feet in the rear of the main hotel building, all situated on block 144, bounded by Burnetts, Sixth, Hudson, and Seventh streets, Silver city, Grant county, New Mexico. And the defendant, for the consideration aforesaid, did, in and by the said policy, promise and undertakes and agrees to make good and satisfy the plaintiff all such immediate damage or loss as may be sustained by him, not exceeding his interest in the premises, to the amount of five thousand dollars, which may occur by fire to the said property from and between the 11th day of July, 1881, at 12 o'clock m., and to the 11th day of July, 1882, at 12 o'clock m.; such loss or damage to be estimated according to the actual cash value of the property at the time of the fire,
7 and not to exceed the cost as said time of reforming or replacing the same after deducting therefrom a suitable amount for any depreciation of said property from use or otherwise, which amount of loss or damage so ascertained the defendant agreed and promised to pay him within 60 days after notice and proof of such loss or damage be made by the plaintiff in compliance with the conditions annexed to said policy, which said policy and conditions are in the words and figures following, to wit:

Copy.

No. 406,025. $5,000.00.

The Fire Association of Philadelphia, organized September 1st, 1817. Incorporated March 27, 1820. Insurance from loss by fire.

In consideration of one hundred and fifty dollars, and of the agreements and conditions herein contained, does insure David Wright to the amount of five thousand dollars, $2,500.00 on his two-story adobe and wood-stuccoed shingle-roof hotel building, to be occupied for hotel purposes, $2,500.00 on his frame-stuccoed two-story shingle-roof dining-hall building (26x41), with one-story stuccoed ell (19x26) or kitchen building, situated about 5 feet in
8 rear of main hotel building. The above buildings are all situated on block 144, bounded by Bennets, Sixth, Hudson, and Seventh streets, Silver City, Grant county, New Mexico, special reference being made to his application No. 406,025, which is his warranty and a part hereof; $5,000.00 other concurrent insurance

on hotel building in the Continental Insurance Co. of New York. In case of loss the assured agrees to pay one-half of the actual expenses of an adjuster from the home office to Silver City, Grant county, New Mexico, against all such immediate loss or damage sustained by the assured as may occur by fire to the property above specified, but not exceeding the interest of the assured in the property, and except, as hereinafter provided for, the term of one year from the eleventh day of July, eighteen hundred and eighty-one, at twelve o'clock noon, to the eleventh day of July, eighteen hundred and eighty-two, at 12 o'clock noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the fire, which loss or damage shall in no case exceed what it would then cost to repair or replace the same, deducting therefrom a suitable amount for any depreciation of
9 such property from use or otherwise, and to be paid to the assured or his legal representatives, as hereinafter provided, subject to the following terms and conditions:

1. Warranty of the assured: The assured, by the acceptance of this policy, hereby warrants that any application, survey, plan, statement, or description connected with procuring this insurance or contained in or referred to in this policy is true and shall be a part of this policy; that the assured has not overvalued the property herein described nor omitted to state to this association any information material to the risk, and this association shall not be bound under this policy by any act of or statement made to or by any agent or other person which is not contained in this policy or in any written paper above mentioned.

It is also part of this warranty that if this policy shall be continued by renewal it shall be considered as continued under the original representations, and that any change in the risk not made known to this association at the time it is so continued shall render this policy void.

This policy shall become void unless consent in writing is endorsed by the association hereon in each of the following instances, viz:

10 1. If the assured is not the sole and unconditional owner of the property, or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy, or if any change takes place in the title, interest, or possession of the property (except in case of succession by reason of the death of the assured), whether by sale, transfer, or conveyance, in whole or in part, or by legal process or judicial decrees, or if foreclose suit shall have been or be hereafter begun or the title or possession be now or hereafter become in any way involved in litigation, or if this policy be assigned or transferred before a loss.

2. If the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned or any part thereof.

3. If the risk be increased by any change in the occupation of the building or premises herein described, or by the erection or occupa-

tion of adjacent buildings, or by any means whatever within the knowledge of the assured.

4. If any building herein described stand on leased ground or be or become vacant or unoccupied for the purpose indicated in this contract for a period of more than five days.

11 5. If the property herein described, a manufacturing establishment, shall be run at night or over time or shall cease to be operated.

6. Or if any of the following-named articles or compounds containing any of them be kept, stored, or used in or on the premises herein described, any custom or usage of trade or manufacture to the contrary notwithstanding, viz., benzine, benzole, benzine varnish, burning fluid, chemical oils, fireworks, gasoline, gunpowder, naphtha, nitro-glycerine, nitrate of soda, oily waste, petroleum and products, phosphorus, rubber cement, saltpetre, spirit-gas, or any article subject to legal restriction.

2. Risks not covered by this policy: This association shall not be liable under this policy for loss or damage by fire in any of the following instances, viz:

1. If caused, directly or indirectly, by means of or in consequence of any invasion, insurrection, riot, civil war or commotion, or military power, or by order of any civil authority, or in consequence of any neglect or violation of any law or ordinance, or by the fraudulent act or procurement of the assured.

2. If caused by lightning or explosion of any kind, unless fire ensues, and then for the loss by fire only.

12 3. If the building herein described or any part thereof fall, except the fall is the result of fire.

4. If caused by the neglect of the assured to use all practicable means to save and protect the property at and after the fire, or when the property is endangered by a fire in neighboring premises.

5. For loss of accounts, bills, notes, deeds, manuscript evidence of debt or securities of property of any kind, or for loss by theft at or after the fire.

6. For any consequential or constructive loss or damage beyond the actual damage by fire to the property, whether such loss or damage be occasioned by any ordinance or law regulating the construction or repair of building or otherwise. Where frame buildings are destroyed by fire and their re-erection is prohibited by municipal or other law, this association shall not be liable for more than the actual cost of rebuilding or repairing the same, if such law was not in operation.

3. Property not covered by this policy unless specified: This insurance does not cover any of the following-named articles or goods unless separately and specifically mentioned in writing in the policy, viz., money or bullion, drawings, models, patterns, tools, implements, painting, sculpture, medals, casts, curiosities, jewels, watches, scientific apparatus, store furniture and fixtures, awnings, signs, yard fixtures, nor goods held on storage.

13 4. General privileges:

1. Kerosence or refined petroleum oil of the legal standard

may be used for lights only; lamps to be filled and trimmed by daylight, and not *and not* within ten feet of artificial light.

2. Mechanics are allowed to make ordinary repairs and alterations to buildings, not exceeding fifteen days in each year of this insurance, without notice to the association. Any extension of this privilege must be previously consented to in writing on this policy.

3. Plate-glass, frescoes, and wall decorations are covered by insurance on the building, but if there shall be any other insurance on the building this association shall be liable only for such proportion of the loss on said plate-glass, frescoes, and decorations as the amount hereby insured shall bear to the whole insurance on the building, whether such other insurance applies to said glass, frescoes, and decorations or not.

5. Relative to issue and cancellation — policy:

1. If any broker or other person than the assured shall have procured this policy or any renewal thereof or any endorsement thereon he shall be deemed to be the agent of the assured and not of this association in any transaction relating to the insurance.

14 2. This insurance may be terminated at any time by request of the assured or by the association on giving notice to that effect. On surrender of the policy the association shall, in the first case, refund any unearned premium that may have been paid at the usual short rates, and, in the other, at *pro-rata* rates.

6. Proceeding in case of loss:

1. When a fire has occurred injuring the property herein described the assured shall use all practicable means to save and protect the same, and shall give immediate notice of the loss, in writing, to this association. When personal property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and causing an inventory thereof of the whole, including property claimed to be totally destroyed, to be made and furnished to this association, naming the quantity, quality, and cost of each article. If the loss sustained be upon a building, fixtures, or machinery the assured shall, if required, furnish duly verified plans and specifications of such property destroyed or damaged. The assured shall, whenever and as often as called upon, exhibit to any person or persons named by the association all that re-

15 mains of said property, damaged or not damaged, for examination.

2. The amount of sound value and of damage to the property may be determined by mutual agreement between the association and the assured, or, failing to agree, the same shall then, at the written request of either party, be ascertained by an appraisal of each article of personal property or by an estimate in detail of a building by competent and impartial appraisers to be selected by each party, and the two so chosen shall first select an umpire to act with them in case of their disagreement, and if the said appraisers fail to agree they shall refer the differences to such umpire, and the award of any two in writing, under oath, shall be binding and conclusive as to

the amount of such loss or damage, but shall not decide as to the validity of the contract or any other question, except the amount of such loss or damage. Each party shall pay their own appraiser and one-half of the umpire's fee.

It shall be optional with this association to take the whole or any part of the articles at their appraised value, and also to repair, replace, or rebuild the property lost or damaged with other of
16 like kind and quality within a reasonable time, giving notice of their intention to do so within sixty days after the completion of the proofs herein required.

3. A particular statement of the loss shall be rendered to this association, at its office in Philadelphia, as soon after the fire as possible, signed and sworn to by the assured, stating such knowledge or information as the assured has been able to obtain as to the time, origin, and circumstances of the fire; also stating the exact nature of the title and interest of the assured and of all others in the property herein described; all incumbrances thereon and the cash value thereof; the amount of loss or damage; all other insurance, whether valid or not, covering any of said property, and a copy of the written parts of all policies; any change in the title, use, occupation, possession, or exposures of said property that may have occurred since the issuing of said policy; how, by whom, and for what purpose the building herein described and the several parts thereof were occupied at the time of the fire, and shall, if required, furnish a certificate, under the hand and seal of the chief of the fire
17 department or other officers having charge of the investigation of fires, if said property is situated in the jurisdiction of any such officer, and, if not, then under the hand and seal of a magistrate nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believe that the assured has honestly sustained loss on the property herein described to the amount which such officer shall certify.

4. The assured shall, whenever required, submit to an examination or examinations under oath by any person appointed by this association, and subscribe to such examination when reduced to writing, and shall also, as often as required, produce their books of account and other vouchers and exhibit the same for examination either at the office of this association or such other place as may be named by its agent, and permit extracts and copies thereof to be made; the assured shall also furnish certified copies of all bills and invoices of the property the originals of which cannot be produced.

18 5. Any fraud or attempt at fraud, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent in any examination or in the proofs of loss or otherwise, shall cause a forfeiture of all claim on this association under this policy, and in such case this association shall have the right at any time to require the same to be delivered up to be cancelled.

6. This association shall not be liable for a greater portion of any loss sustained upon any property described in this policy than the sum hereby insured thereon bears to the whole sum insured thereon, whether such other insurance be by policies or otherwise, or whether prior or subsequent to this insurance, or whether such other insurance be valid or not, and without reference to the solvency of the other insuring companies.

In the event of partially non-concurrent insurance then to determine the liability of this association it shall be assumed that policies other than specific shall contribute with specific policies in the proportion that the loss on the property included in each item of the specific policies bears to the total loss for which the more general policies are liable. The adjusted claim under this
19 policy shall be due and payable sixty days after the full completion by the assured of all the requirements herein contained.

7. Reinsurance in case of loss shall be settled in proportion as the sum reinsured shall bear to the whole sum specified in the contract or contracts of the reinsured company.

8. When this association shall claim that the fire was caused by an act or omission of any person, town, or corporation which created a cause of action, the party to whom the loss is payable under this policy shall, on recovering payment, assign to this association such cause of action.

9. It is hereby expressly provided that no suit or action against this association for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless such suit or action shall be commenced within twelve months next after the fire shall have occurred, and should any suit or action be commenced against this association after the expiration of the aforesaid twelve months the lapse of time shall be taken and
20 deemed as conclusive evidence against the validity of such claim.

In witness whereof the fire association on its part has caused these presents to be signed by its president and attested by its secretary, in the city of Philadelphia, this eleventh day of July, in the year of our Lord eighteen hundred and eighty-one; but this policy shall not be valid unless countersigned by its duly authorized agent at Las Vegas, New Mexico.

A. LOWDEN SNOWDEN, *President.*

Attest: JACOB H. TEX, *Secretary.*

Countersigned at Las Vegas, New Mexico, this eleventh day of July, one thousand eight hundred and eighty-one.

T. B. MILLS, *Agent.*

(Here insert copy of endorsement of back of policy.)

And the plaintiff avers that at the time of making the policy, and from thence until the happening of the loss and damage hereinafter mentioned, he was the owner of and had an insurable interest in the property described herein greatly exceeding the amount of the said sum so by the defendant insured thereon as aforesaid.

21 And the plaintiff further avers that on the 11th day of January, 1882, the said property was consumed and destroyed by fire, whereby the plaintiff then and there sustained a loss and damage, to wit, on said property to the amount of $15,000; and the plaintiff avers that said loss and damage did not happen by means or in consequence of any invasion, insurrection, riot, civil war, or commotion, or military power, or by order of any civil authority, or any neglect or violation of any law or ordinance, or by the fraudulent act or procurement of the plaintiff, or by the falling of the property, except as the result of the fire aforesaid, or by lightning or explosion of any kind, except as a result of said fire, or by any neglect of the plaintiff to use all practicable means to save and protect the property at and after the fire or during the same.

Endorsed on back and copied as follows: Insurance for building; Fire Association of Philadelphia; policy No. 406,025; to David Wright, Silver City, New Mexico; amount insurance, $5,000.00; premium, $150.00; expires, July 11th, 1882.

22 Plaintiff further avers that forthwith after the loss and damage on, to wit, the day of 19th January, 1882, he gave notice in writing thereof to the defendant, and as soon thereafter as possible, to wit, on the 12th day of May, 1882, then delivered to the defendant, at the city of Philadelphia, as particular statement and amount of the loss and damage as the nature of the case would admit, signed and sworn to by the plaintiff, together with duly verified plans and specifications of said property destroyed and damaged, to which said statement annexed and therewith delivered a certificate, under the hand and seal of John S. Rilea, the magistrate nearest the place of fire, and who was not concerned in the fire as creditor or otherwise or related to the plaintiff, stating that he had examined the circumstances attending the loss, knew the character and circumstances of the plaintiff, and verily believed that the plaintiff has honestly sustained loss on the property herein described to the extent of $12,000; and the plaintiff further avers that the defendant has not rebuilt, replaced, or repaired the property aforesaid or given any notice of its intention to do the same.

23 And the plaintiff further avers that, although he has kept and performed all things in the said policy contained on his part to be kept and performed, and although he has sustained a loss and damage by fire on the said property in the manner and form and to the amount aforesaid, to wit, $15,000, nevertheless the defendant, though often requested, has not yet paid to the plaintiff the amount of insurance in said policy, to wit, the said sum of five thousand dollars or any part thereof, but refuses so to do, to the damage of the plaintiff of fifteen thousand dollars, and therefore he brings suit hereon, — so forth.

And whereas also *on* the defendant, on the 26th day of January, 1882, in the county aforesaid, was indebted to the plaintiff in the sum of fifteen thousand dollars for money before that time received by the defendant for the use of the plaintiff, and in the like sum for interest on divers sums of money before that time, forborne by the plaintiff to the defendant at its request for divers spaces of time before then elapsed, and in the like sum for money found to be due from the defendant to the plaintiff on account, then and there stated between *time*, and, being so indebted to the defendant
24 in consideration thereof, then and there promised the plaintiff to pay him, on request, the same sums of money so due to him as aforesaid.

Yet, although the day of payment of the several sums of money above specified has long since elapsed, *yet* the defendant has not paid *or* any or either of the sums, or any part thereof, as well as the said sum of money above specified agreed to be paid on account of said loss or damage, but refuses so to do, to the damage of the plaintiff of fifteen thousand dollars, and therefore he brings this suit, etc.

CHARLES D. HODGES,
JAMES R. WARD,
Attorneys for Plaintiff.

The Fire Association of Philadelphia Dr. to David Wright.

For interest	$15,000
To money had and received	15,000
To account stated	15,000

DAVID WRIGHT.

Copy of Petition for Removal of this Cause to U. S. Circuit Court, Southern Dist. of Illinois.

STATE OF ILLINOIS:

In the Circuit Court of Greene County.

DAVID WRIGHT, Plaintiff,

v.

THE FIRE ASSOCIATION OF PHILADELPHIA, Defendant.

25 To said circuit court:

Your petitioner, The Fire Association of Philadelphia, respectfully shows to the honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that the petitioner was, at the time of the commencement of this suit and still is, a citizen of the State of New York, and plaintiff, David Wright, was then and still is a citizen of the State of Illinois; that the subject-matter and controversy in said suit is not upon a claim or cause of action arising out of any business or transaction in fact done in the

State of Illinois, but is upon a claim or cause of action arising out of business and transaction in fact done in the Territory of New Mexico.

And your petitioner offers herewith a bond, with good and sufficient surety, for petitioner's entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by
26 said circuit court, if said court shall hold that this suit was wrongly or improperly removed thereto.

And petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of Illinois; and your petitioner will ever pray.

THE FIRE ASSOCIATION OF PHILADELPHIA,
By PHILLIPS & STEWART, *Att'ys.*

STATE OF ILLINOIS, }
County of Greene, } *ss:*

I, J. W. Phillips, being duly sworn, do say that I am a member of the firm of Phillips & Stewart, the attorneys of the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contestants thereof, and that the statements and allegations therein contained are true, as I verily believe.

J. W. PHILLIPS.

Subscribed by the said J. W. Phillips in my presence and by him sworn to before me this the 13th day of September, 1882.

T. J. ALBERT,
Cir. Clerk.

Copy of Proceedings in Circuit Court as Appears of Record in Circuit Court Docket.

Among other proceedings, the following were had and
27 entered of record under date of September 6th, 1882, and entered of record, to wit:

DAVID WRIGHT *vs.* FIRE ASSOCIATION OF PHILADELPHIA.

Assumpsit.

And now comes the plaintiff and moves for leave to amend summons. On consideration, leave granted to amend summons.

On September 21st the following proceedings were had and entered of record, to wit:

In the Greene County Circuit Court.

DAVID WRIGHT, Plaintiff,

vs.

THE FIRE ASSOCIATION OF PHILADELPHIA, Pennsylvania, Defendant.

Now, at this day, comes the Fire Association of Philadelphia, Pennsylvania, the defendant in the above-entitled cause, by Phillips & Stewart, its attorney-, and enters its appearance herein, and at the time of so doing files herein its petition for the removal of said cause from this court to the circuit court of the United States for the southern district of Illinois, and also files with said petition the bond, with surety, required by the law of the United States in such cases made and provided.

And said bond and surety approved and accepted by the court, it is ordered by this court that said cause be no further proceeded with in this court, but that the prayer of said petition be granted; and it is further ordered that clerk of this court forthwith certify
28 to the circuit court of the United States for the southern district of Illinois a full, true, and complete transcript of the record and proceedings in this cause as fully as the same may be of record in this court.

Copy of Power of Att'y Authorizing J. W. Phillips to Act as Agent for the Fire Association of Philadelphia, etc.

Know all men by these presents that the Fire Association of the City of Philadelphia has constituted and appointed, and does by these presents constitute and appoint J. W. Phillips, of St. Louis, Missouri, its agent and attorney with power and authority to sign the name of said company to any bond or bonds that may be required to be executed in order to remove the suit or cause of action now pending in the circuit court of Greene Co., State of Illinois, in which David Wright is plaintiff and the Fire Association of the City of Philadelphia is defendant, from said circuit court to the circuit court of the United States for the southern district of Illinois; and the said Fire Association of the City of Philadelphia hereby ratifies and confirms all that the said J. W. Phillips has done in respect of said removal, and especially adopts, ratifies, and confirms the signing by him of the name of this company to a bond for the removal of said cause in the penal sum of five hundred dollars and
29 dated and signed on the 13th day of September, A. D. 1882, on which Stephen F. Corrington and J. W. Phillips are sureties, and which bond is now on file in said circuit court of Greene Co., Ill., with the petition for the removal of said cause; and the said company hereby acknowledge- itself as fully bound by the said bond as though the same were signed by its president and its corporate seal attached.

In witness whereof the said Fire Association of the City of Philadelphia has caused these presents to be duly signed and the corporate seal attached this 21st day of September, '82.

[SEAL.] A. LOUDON SNOWDEN, *Pres't.*

JACOB H. SEX, *Sec'y.*

Copy of Bond.

Know all men by these present that The Fire Association of Philadelphia, as principal, and Stephen F. Corrington and J. W. Phillips, as sureties, are held and firmly bound unto David Wright in the penal sum of five hundred dollars, the payment whereof, well and truly to be made unto the said David Wright, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions the said Fire Association of Philadelphia having petitioned the circuit court of Greene county,
30 State of Illinois, for the removal of a certain cause herein pending, wherein David Wright is plaintiff and The Fire Association of Philadelphia is defendant, to the circuit court of the United States in and for the southern district of Illinois; Now, if The Fire Association of Philadelphia, your petitioner, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this the 13th day of September, A. D. 1882.

THE FIRE ASSOCIATION OF PHILADELPHIA,
By J. W. PHILLIPS, *Att'y.* [SEAL.]
S. T. CORRINGTON. [SEAL.]
J. W. PHILLIPS. [SEAL.]

STATE OF ILLINOIS, *Greene County,* } *ss:*

I, —— ——, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Illinois and a property-holder therein; that I am worth
31 the sum of five hundred dollars, over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

Subscribed in my presence by — and sworn to before me this — day of September, A. D. 1882.

STATE OF ILLINOIS, *Greene County,* } *ss:*

I, Thomas J. Albert, clerk of the circuit court of Greene county, in the State aforesaid, and keeper of the records and files of said court, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record and proceedings in a certain cause then pending in said court, on the law side thereof, wherein

David Wright is plaintiff and The Fire Association of Phil. are defendants, as the same appear from the records and files of said court now in my office remaining; and, further, the fees paid by J. W. Phillips, six dollars.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Carrollton, this 22d day of November, A. D. 1882.

[L. S.] THOMAS J. ALBERT, *Clerk.*

Indorsed: Filed December 27, 1882. J. A. Jones, clerk.

32 And afterwards, to wit, on Wednesday, the ninth day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-four, the following proceedings were had in said court in said cause and entered of record, to wit:

DAVID WRIGHT *vs.* FIRE ASSOCIATION OF PHILADELPHIA.

Assumpsit.

On motion of plaintiff, by J. R. Ward, Esq., his attorney, the defendant is ruled to plead herein by to-morrow morning.

And afterwards, to wit, on Friday, the 30th day of January, in the year of our Lord one thousand eight hundred and eighty-five, came the defendant, by Palmer & Phillips, its attorneys, and filed in the clerk's office of said court its plea, which said plea is in the words and figures following, to wit:

Plea.

WRIGHT *vs.* FIRE ASSOCIATION OF PHILADELPHIA.

32½ And the defendant, by its attorneys, comes and defends the wrong and injury, when, &c., and says it did not promise and undertake in manner and form as the plaintiff has above thereof complained against him, & of this he puts himself upon the country.

PALMER & PHILLIPS,
For Def't.

And the plaintiff doth likewise.

BISBEE & WARD,
Attorneys for Plaintiff.

Indorsed: Filed Jan'y 30, 1885. J. A. Jones, cl'k.

And afterwards, to wit, on Monday, the 2d day of February, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-five, the following proceedings were had in said court in said cause and entered of record, to wit:

DAVID WRIGHT *vs.* FIRE ASSOCIATION OF PHILADELPHIA.

33 This day comes as well the plaintiff, by Messrs. L. H. Bisbee and J. R. Ward, his attorneys, as the defendant, by Messrs. Phillips & Stewart and John M. Palmer, Esq., its attorneys, and issue being joined, whereupon, by consent, comes the jury heretofore impanneled in suit of David Wright *versus* The Continental Fire Insurance Company, to wit, P. H. Pentzer, James A. Drennan, William Carson, I. B. Betts, William J. Downs, Michael H. Beaver, William H. Cotter, John F. Black, James Attig, John H. Gregory, Thomas Knox, and Alexander Moore, duly elected, tried, and sworn to try said issue, and having heard the evidence, argument of counsel, and receiving the instructions of the court, for verdict say: "We, the jury, find the issue for the plaintiff and assess his damages to the sum of five thousand seven hundred and fifty dollars."

It is, therefore, ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of five thousand seven hundred and fifty dollars, his damages aforesaid assessed by the jury, together with the sum of —— dollars and —— cents, his costs and charges herein about his suit in this behalf expended, and that execution issue therefor.

34 And afterwards, to wit, on Saturday, the ninth day of May, in the term and year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

DAVID WRIGHT *vs.* FIRE ASSOCIATION OF PHILADELPHIA.

Assumpsit.

And now, on this 9th day of May, 1885, come again the parties, by their counsel, and submit to the court the defendant's motion for a new trial, and the court, having heard and considered their allegations and proofs and being sufficiently advised in the premises, doth order and adjudge that the motion be overruled, and leave is given to the defendant to tender a bill of exceptions within sixty days from this date.

And afterwards, to wit, on Thursday, the second day of July, in the year of our Lord one thousand eight hundred and eighty-five, comes the defendant and files in the clerk's office of said court its bond to the plaintiff in this cause, which said bond is in the words and figures following, to wit:

35 Know all men by these presents that we, the Fire Association of Philadelphia, as principal, and B. H. Ferguson, as surety, are held and firmly bound unto David Wright in the full sum of eleven thousand five hundred dollars, to be paid to said David *David* Wright, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the second day of July, 1885.

Whereas lately, at the January term, 1885, of the circuit court of the United States for the southern district of Illinois, in a suit depending in said court between David Wright, plaintiff, and the Fire Association of Philadelphia, defendant, judgment was rendered against the said Fire Association of Philadelphia for the sum of five thousand seven hundred and fifty dollars and costs, and the said Fire Association of Philadelphia having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit,
36 and a citation directed to the said David Wright citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Fire Association of Philadelphia shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make good its said plea, then the above obligation to be void; else to remain in full force and virtue.

FIRE ASSOCIATION OF PHILADELPHIA,
By J. W. PHILLIPS, *Att'y.* [SEAL.]
B. H. FERGUSON. [SEAL.]

Approved to operate as a supersedeas July 2nd, 1885.
S. H. TREAT,
Dist. Judge.

Indorsed: Filed July 2, 1885. J. A. Jones, clerk.

37 And afterwards, to wit, on Tuesday, the seventh day of July, in the year of our Lord one thousand eight hundred and eighty-five, comes the defendant, by its attorneys, and presents to the court its bill of exceptions in this cause, which is signed, sealed, and made part of the record in this cause, and is in the words and figures following, to wit:

38 *Bill of Exceptions.*

DAVID WRIGHT
vs.
THE FIRE ASSOCIATION OF PHILADELPHIA.

Be it remembered that on the trial of this cause the following proceedings were had. It was stipulated and agreed between the plaintiff and defendant, before the jury was impaneled, that under the plea of the general issue plead in this cause defendant might introduce any other evidence, which might be introduced under notice of special defenses. Thereupon, the jury being impaneled, the plaintiff, to sustain the issues on his part, offered and proved the execution of *a* the policy sued on, and read the same in evidence to the jury, the material parts of which are as follows:

The Fire Association of Philadelphia, in consideration of one hundred and fifty dollars and of the agreements and conditions herein

contained, does insure David Wright to the amount of five thousand dollars, $2,500 on his two-story adobe and wood-stuccoed shingle-roof hotel building, to be occupied for hotel purposes, $2,500 on his frame-stuccoed two-story shingle-roof dining-hall building
39 (26x41), with one-story stuccoed ell (19x26) or kitchen building, situated about five feet in rear of main hotel building. The above buildings are all situated on block 144, bounded by Bennett, Sixth, Hudson, and Seventh streets, Silver City, Grant county, New Mexico, special reference being made to his application, No. 406,025, which is his warranty, and a part hereof, $5,000, other concurrent insurance on the hotel building in the Continental Ins. Co. of New York. In case of loss the assured agrees to pay one-half the actual expenses of an adjuster from the home office to Silver City, Grant county, New Mexico, against all such immediate loss or damage sustained by the assured as may occur by a fire to the property above specified, but not exceeding the interest of the assured in the property, and except as hereinafter provided for the terms of one year, from the eleventh day of July, eighteen hundred and eighty-one, at twelve o'clock noon, to the eleventh day of July, eighteen hundred and eighty-two, at 12 o'clock noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the fire, which loss or damage shall in no case exceed what it would then cost to repair or replace the same, deducting therefrom a suitable amount for any depre-
40 ciation of such property from use or otherwise and to be paid to the assured or his legal representatives, as hereinafter provided, subject to the following terms and conditions:

Warranty of the assured: The assured, by the acceptance of this policy, hereby warrant- that any application, survey, plan, statement, or description connected with procuring this insurance or contained in or referred to in this policy is true and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this association any information material to the risk; and this association shall not be bound under this policy by any act or any statement made to or by any agent or other person which is not contained in this policy or in any written paper above mentioned.

This policy shall become void unless consent in writing is endorsed by the association hereon in each of the following instances, viz:

If the assured is not the sole and unconditional owner of the property, or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, or otherwise, is not truly stated in this policy, or if any change takes place in the title, interest, or possession of the property, except in case of succession by reason of the death of the assured, whether by
41 sale, transfer, or conveyance, in whole or in part, or by legal process or judicial decree, or if foreclosure suit shall have been or be hereafter begun, or the title or possession be now or hereafter become in any way involved in litigation, or if this policy be assigned or transferred before a loss.

If the risk be increased by any change in the occupation of the building or premises herein described, or by the erection or occupation of adjacent buildings, or by any means whatever within the knowledge of the assured.

Or if any of the following-named articles or compounds containing any of them be kept, stored, or used in or on the premises herein described, any custom or usage of trade or manufacture to the contrary notwithstanding, viz., benzine, benzole, benzine varnish, burning fluid, chemical oils, fireworks, gasoline, gunpowder, naphtha, nitro-glycerine, nitrate of soda, oily waste, petroleum and products, phosphorus, rubber cement, saltpetre, spirit-gas, or any article subject to legal restriction.

In witness whereof the Fire Association on its part has caused these presents to be signed by its president and attested by its secretary, in the city of Philadelphia, this eleventh day of July, in the
42 year of our Lord eighteen hundred and eighty-one; but this policy shall not be valid unless countersigned by its duly authorized agent at Las Vegas, N. M.

A. LOUDON SNOWDEN, *Pres.*

Attest: JACOB D. LEE, *Secretary.*

Countersigned at Las Vegas, N. M., this eleventh day of July, one thousand eight hundred and eighty-one.

T. B. MILLS, *Agent.*

And, further to sustain the issues on his part plaintiff, read the deposition of Joseph Lusigman, who testified in substance that he was twenty-three years old; resided in New Mexico; occupation, millwright and carpenter. He knew the plaintiff, who was generally known as one of the firm of Wright, Roodhouse & Edwards, in Silver City, New Mexico, and knew the property that was burned as the Carrollton Hotel; that when that hotel was built he did the carpenter work, and had charge of the plastering and putting in the pipes which were intended to heat the house, and that when the hotel was completed he slept in it and kept his tools and baggage there; that when he repaired Wagner's building, occupied by Samuel Exstein, in Silver City, he found two small cans of DuPont powder and one large can of blasting powder about a quarter full. Exstein gave it to him and he took it to the Carrollton Hotel, where he had his carpenter's bench on the ground floor, in the
43 southwest room of the building, which he was then using as his carpenter shop while working on the hotel, and witness used this room as a carpenter shop while he remained in Silver City; that no one knew of this powder being there but himself; that he had charge of the hotel himself after Wright went East, and Wright told him to keep an eye on things around there. Graham was then working a mine at Georgetown, but witness did not know whether Graham had the general management of the hotel at that time or not. Witness carried the powder to the hotel on his own responsibility; and he further stated that this powder, when he came to examine it afterwards, had been wet, was caked and in lumps,

and that parties who had intended to use it on a trip to Mexico refused to take it or to take their chances among the Indians with that kind of powder. The powder in the large can had also been wet. Witness threw out the two small cans and put the large can back in his chest, and then went to a sack he had in there which contained giant powder and fuse caps. The giant powder was the same as he had taken from the Carrollton quartz mill. He had intended to use it in some mines he had in the country. He gave to the parties who went into Mexico all but four sticks of the giant powder and part of the coil of fuse, and he gave them all the
44 caps. The giant powder was only in his chest a few days before he gave it away to these parties. He had kept the same powder in a stone stable until he purchased a horse, but afterwards he removed the giant powder to his chest in the hotel. No one knew the giant powder was in there except himself and the party who went to Mexico. The other four sticks of giant powder and the remaining fuse he left on a window-sill in a room of the hotel adjoining the carpenter shop. At the time of the fire he had removed one tool-chest from the hotel, but his tent, pick, shovel, drills, and hammer, and the balance of his baggage he left in the hotel, and also one tool-chest. Witness further stated that on the twelfth or thirteenth of December, 1881, he quit sleeping at the hotel. Went there a few times afterwards to see about the tools and to get some if he needed them. He had the keys to two rooms and locked them from the inside. He left the keys in the key-holes. He was not at the hotel on the night of the fire, and did not know of it till six o'clock the next morning.

On cross-examination he said he first went into the Carrolton hotel building upon authority of David Wright, who told him he could go and sleep in there, and he went in there after it was
45 completed upon the consent of David Wright. He was in there before and up to the completion of the building. After the completion he occupied and used a portion of the building for doing his work as a carpenter by David Wright's consent and remained there until he left by Wright's consent. Witness supposed he took orders from Mr. Wright and Mr. Edwards alike with regard to the building after its completion.

On redirect examination he said he know nothing about any transfer, and if there was any made he didn't know whether the orders he referred to were given before or after the transfer. He said he believed Wright gave him the last order to go and put in the plumbing, but he did not know who the owner was.

Plaintiff also read the deposition of John J. Bell, who stated that his age was thirty-six; occupation, an attorney-at-law; residence, Silver City, New Mexico; that he and his partner were the attorn*ies* of Wright, and after the burning of the building notified defendant of the loss, when he was referred to J. T. Dargan, of Dallas, as the agent of the company, with whom he corresponded. Dargan came to Silver City in February, after the fire, and told him he was an adjuster for the defendant and also the other company with

which the building was insured, and he called for the
46 ground plan and then for the plans and specifications of the building. The ground plan was furnished, and the plans and specifications being in the office of Meredith & Aleman, bankers, Dargan saw them there. The witness offered to get Dargan a copy, but Dargan said it was not necessary. Dargan afterward wrote from Dallas that he was not an adjuster, and that he did not represent himself as such, and then witness proceeded to act according to the terms and requirements of the policy. The correspondence referred to is that attached to the deposition of his partner, J. M. Wright. When witness was introduced to Dargan, Dargan said he had lost his carpet-bag, containing valuable papers connected with this insurance matter, which he had left on the train, and he seemed very much distressed about the loss of the papers. Dargin said he was an adjuster, but couldn't tell till after an investigation whether he would recommend the replacing of the building or settling the insurance. He would have to look around and see what could be done.

Plaintiff also read the deposition of John Graham, who testified that his age was forty-one; occupation, keeping a grocery and livery stable, and residence, Silver City, New Mexico. He knew Wright and was in his employ; went to work for the company
47 in 1881 and worked about twenty months, mining a portion of the time and serving as watchman in what was called the Carrollton Hotel in Silver City. The same building was afterwards burned down. He had charge of the property and also of the house adjoining it on the north at the time of the fire. He was in bed in the house adjoining the hotel; had no knowledge as to the cause of the fire. About four o'clock on the morning of the fire a negro who slept in the hotel knocked at the door of witness and said The hotel is on fire. Witness got up, but, seeing no possibility of putting out the fire, he saved what doors and windows he could. He knew nothing about any powder being in the building. Would not allow the men to keep a lamp in it even, but made them burn candles. Witness was at the hotel every night except the night of the fire. That night he was out a little late and went to bed with one Washington. A darkey by the name of Thornton and a Frenchman by the name of Lusigman, who plastered the hotel, were in charge of it by authority of witness. "I never gave Lusigman or any one else permission to keep gunpowder or other combustible material in or about the building, and never knew they were doing so."
48 Plaintiff knew Thornton. He was not in plaintiff's employ at that time, but he had been and was regarded as a good, faithful servant, and Thornton had privilege from witness to sleep in the hotel. Witness knew Dargan; had met him in Silver City and sworn to an affidavit and given it to him. The affidavit was about who was in charge of the property when it burned and as to how it was taken care of. At the request of Dargan witness had furnished plans and specifications, giving them to Robert Black. By instruction of Dargan witness also paid for them. Dargan told the witness he was agent of the companies, and Dargan was made

acquainted with witness by Mr. Williams, deputy postmaster. Dargan said he came to get surveys of the property.

On cross-examination witness said he entered the employ of the company on the seventh of January, '81, and remained in their employ till after the burning of the hotel. Witness gave Lusigman and Thornton the use of a room in the hotel in consideration of their having an eye on the property in his absence. Witness was shown a paper in the words and figures following, which he said he wrote, but claimed he just scribbled it off in his own office.

I was watchman at the Carrolton Hotel when it was in-
49 sured. Mr. Wright told me that I need not watch it any longer; that it was insured and he did not care if it was burnt or not; that it was no good and he hoped that some one would burn it in order that he could get the insurance. S. E. offered J. S. three hundred dollars if he would burn it. J. S. said that he would not do it; that he must get some one else. D. Wright did not own the property. It belonged to W. R. & Co. (Marked Exhibit A to Graham's deposition.)

Witness said the Carrolton Hotel was not occupied as a hotel at the time of the fire.

On re-examination witness said that the writing, Exhibit A, was not written for any purpose at all, but was only a piece of scribbling.

On recross-examination he said that the initials S. E. and J. S. in Exhibit A stood for just those letters.

Plaintiff also read the deposition of Wm. Chamberlain, who testified that his age was fifty; he resided in Silver City, and had known the plaintiff two years. He knew the Carrolton Hotel that was burn. Witness lived about three or four hundred feet from the building. He had been living at the same spot for about
50 eight years. Witness was about the hotel nearly every day while it was being built, and thought the cost of construction was about thirteen thousand dollars. He regarded thirteen thousand dollars as the fair value of the building at the time it was burned. Witness thought there were two or three persons stopping at the building from the time the roof was put on until it burned, and that Graham was one of them; saw Graham there frequently; was there the night of the fire, and saw Graham there.

On cross-examination witness said he had nothing to do with building the new building, but helped to put up the old adobe building in 1872.

R. B. Washington's deposition was also read by plaintiff, who testified that he was twenty-six years old and lived in Georgetown, N. M. Witness was at the fire; was visiting in Silver City at the time; knew Graham, and saw him on the night of the fire, both before and during the fire. Witness slept with him that night. Witness and Graham slept in the office of the Carrolton Company, a little north of the hotel building. About two o'clock witness was awakened by some one crying fire. The fire started on the second floor of the hotel and had burned through the ceiling of first story
51 when witness saw it. Some persons had already arrived and

Graham and the witness tried to save windows and doors, and so forth. The room witness and Graham slept in was about eighty or eighty-five feet from the hotel, with a fence between, and was in the same block with the hotel. Witness thought that, on account of the scarcity of water and the condition of the fire when he discovered it, it could not have been put out.

On cross-examination he said that to the best of his knowledge the hotel building had not been occupied as a hotel up to the time of the fire. The building in which they slept had no connection with the hotel, as far as witness knew.

The deposition of John M. Wright was then read by plaintiff. John M. Wright testified that he was thirty-two years old and an attorney-at-law, residing in Silver City, where he had lived two years. He was one of the law firm of Bell & Wright, and as such had business with both the Continental and the Fire Association of Philadelphia. He knew the hotel property before it was burned, but knew nothing of the fire itself. Shortly after the fire his law firm received a letter from the plaintiff requesting them to attend to the adjustment of the insurance upon the hotel property, but nothing was done until Mr. Dargan arrived in Silver City, representing
52 himself to be an agent of the Fire Association of Philadelphia and of the Continental Assurance Company of New York. Witness and his partner answered all questions put by Mr. Dargan and furnished him every facility in their power to ascertain all the facts concerning the fire and the character of the building burned. Witness went with Dargan to the house of Meredith & Aleman, where documents which purported to be plans and specifications of the building were submitted for Dargan's inspection. The recollection of witness was that no exact drawings and specifications of the building were in existence. At Dargan's request witness employed an engineer, Mr. Swain, who, he thought, was to make drawings of a ground plan of the hotel, according to the description given him by the builders. Witness thought the name of the builder was Joseph Lusigman. Dargan requested these drawings to be delivered to Robert Black, contractor and builder, as soon as possible after his departure. Witness complied, but took no further action until March14, '82, when he wrote two letters—one to each of the insurance companies concerned in the loss in question. The letter addressed to the Continental Insurance Co. was here read and was to the effect that Bell & Wright, as attornies of the
53 plaintiff, had met Mr. Dargan at Silver City and had furnished him every facility in their power to prosecute his investigations, and they had given to Robert Black a ground plan of the building burned, and they inquired whether anything more was needed, offering to give any reasonable data that might be required. The letter stated that nearly two months had elapsed since the fire and further action was still awaited. To this a response was received, which was read, to the effect, after acknowledging the receipt of letter above referred to, that if they had a claim against the company they were recommended to correspond on the subject with Mr. J. T. Dargen, of Dallas, Texas. A letter was then read

from J. T. Dargan, addressed to Bell & Wright, of the tenor following, being dated April first. After acknowledging the receipt of their letter of March fourteenth, referred to them by the home office, and stating that no proof of loss had ever been received, according to the terms of the policy, and referring to the circumstances of the fire, the letter stated that a strict compliance with the conditions of the policies would be required, and they were requested to forward proofs of loss at the earliest convenience, as it was impossible to do anything in the matter until such were received. The letter
54 stated that notice of the loss had been forwarded to the company as soon as it occurred, but that no proofs of loss had been received. A letter from Bell & Wright to Dargan & Trezevant, dated April 12th, was then read, to the following effect: That the letter of April first had been received; that they were not aware Dargan & Trezevant had full charge of the matter, and that their firm name and place of business was unknown until made known in the letter referred to. It had been gathered from Mr. Dargan, while he was at Silver City, that he was acting as adjuster for the two companies, and it had been inferred he was acting directly from the home office; and, referring to the statement that no proofs of loss had been received, the letter claimed that Mr. Dargan had had his own way while at Silver City in adjusting the whole matter; had been asked whether anything further was needed. Full compliance had been made with all his demands, and it had been supposed that the adjuster while at Silver City had secured all proofs of loss himself, and that until the receipt of the letter referred to Mr. Dargan had been considered as the agent of both parties and not merely as the attorney of one, inasmuch as his expenses,
55 by the terms of the policies, was to be borne by the companies and their clients mutually; that it was well, however, an understanding had been reached so early; that they waived no right of their client on account of anything which had thus far transpired; that George Henderson was then the agent of Mr. Wright and desired it should be stated explicitly what portion of the requirements had not yet been *required* with, for it was his understanding, as well as the understanding of Bell & Wright, that sworn statements had already been submitted in respect to the loss. The witness went on to state that the sworn statement referred to in the letter read was an affidavit made by Graham at the request of Dargan when the latter was in Silver City. The affidavit had been submitted, with full proof of loss, at the time when it was supposed Dargan was acting as adjuster directly from the home office, and the witness explained that one reason why he was supposed to be an adjuster for the home office was that one of the policies contained a provision that the plaintiff in the case of a loss should bear half of the expenses of an adjuster to be sent from the home office. The witness said that the last direction Dargan gave was to furnish the ground plan to be made
56 by Swain to Black, and the doing of that was the last action taken by Bell & Wright until the writing of the two letters, as above stated. To the letter last above read witness re-

ceived a reply, dated April 18, which was read to the effect following: That it was true Dargan had made such investigations as he saw fit while in Silver City, but that that did not relieve the plaintiff from making the customary proof of loss, as required by the policy. The attention of Bell & Wright was called to the requirement of the policy in this respect, and it was asserted that none of the rights of the companies were waived which required proofs of loss according to the conditions referred to; that the policies would show what proofs were needed; that Mr. Dargan did not act as adjuster or agent for both sides, and had never called upon David Wright to bear any portion of his expenses in going to Silver City and returning; that it was true that the policies stated that in case a settlement should be reached the assured should bear one-half of the expenses, but until then the plaintiff was not expected to make any advances on that account; that the sworn statement of Graham was in no sense such a proof of loss as was required by
57 the policies; that Dargan only took Graham's statement as evidence he wished to perpetuate, and that Graham's statement did not relieve the plaintiff from his duty. The witness then stated that in answer to the letter last read documents were prepared intended to cover the requirements of the policies, which documents were signed by the plaintiff and forwarded by express to Dargan & Trezevant, at Dallas, Texas. Of these witness had kept copies.

Plaintiff here offered proofs of loss, signed and sworn to by David Wright, representing that the building in question was insured on the eleventh day of July, 1881, and burned on the nineteenth of January following; that it was built for a hotel, but that from the time it was completed until it was burned it had not at any time been occupied, nor at the time of burning was it occupied, as a hotel. Proofs of loss were accompanied by a certificate of John S. Rilea, magistrate, that Wright had sustained a loss by the destruction of the hotel by fire to the extent of $13,000.

Plaintiff also read the affidavit of Joseph Lusigman, which was in substance that the value of the property at the time of the fire was $12,000.

58 Witness stated that this affidavit had been forwarded at the same time with the other papers last above referred to. Witness further stated that at the same time was also forwarded an affidavit by John Graham, which affidavit was read and was to the affect that Graham was in the employ of the plaintiff to take care of and protect his property, both real and personal, in Silver City, and that on the 19th of January, 1882, the hotel property belonging to said Wright was burned and totally destroyed by fire; that he had two men employed by himself as the agent of Wright, who slept inside and occupied the premises; that these men were occupying the premises at the time and long prior to the time the same burned down, and that affiant was also about the premises nearly all the time, and on the night of the fire was sleeping in the premises adjoining on the north of the hotel; that at the time of the fire he did all he could to save the property and rescue it from the flames;

that he did not know what caused the fire, but was certain it was not caused by or the result of any neglect of duty on the part of any one employed by Wright, the plaintiff; that he did not pretend to be a mechanic, but believed that plaintiff's loss from the fire
59 would not fall short of fifteen thousand dollars; that, inasmuch as he had heretofore given J. T. Dargan a statement of facts under oath pertaining to the matter, at the request of Dargan, he did not deem it necessary in the affidavit to state anything further.

Witness further testified that he sent a letter accompanying the proofs of loss and affidavits above referred to, which letter was read by plaintiff and was, in substance, that the documents transmitted were thought to be in strict conformity with the requirements of the policy, and that the whole thing appeared to Bell & Wright as a matter of supererogation, in view of their knowledge of the facts, yet they cheerfully acquiesced in the caprices of great corporations; that they stood upon two propositions, namely, the rebuilding of the hotel or otherwise the face of the policies; and, in conclusion, the letter referred to Dargan's action at Silver City and to a letter received from the Continental Insurance Company of New York, from both which Bell & Wright inferred a disposition not to meet the issues squarely, and that if such inference were a mistake they were willing and would apologize.
60 Witness stated that nothing else was sent to Dargan & Trezevant except a letter, dated June ninth, which was also read, the substance of which is as follows: That Dargan & Trezevant's letter of May twenty-fourth was received and had been carefully considered, and, in connection with all the facts enveloping the business, together with their knowledge of what could be proved by reliable witnesses, they felt content to allow the matter to stand as it was, and that they felt that if compelled to bring suit it was the duty of Bell & Wright to retain all such matters of evidence as the insurers were fishing for, and they were fully satisfied they had sufficiently complied with the policies.

On cross-examination witness testified that the hotel building was not occupied at any time, from the date of its completion until the time it burned, to his knowledge, as a hotel. His recollection was that a family occupied the eastern wing of the building and that John Graham slept in and took care of it, and that at one time during the summer J. L. Holland occupied one of the rooms; that Holland occupied a room in the second floor, and that when
61 witness went to see him there, in the summer of '81, on several occasions he saw a woman and one or two children there who seemed also to be residing there, but he did not know by what authority they resided there and did not know positively that they did reside there, nor did he know of his own knowledge that Graham actually resided in the building.

Plaintiff next read the deposition of John M. Ginn, who testified that he was forty-three years old; resided in Silver City, N. M., and that his occupation was a lawyer; that he had practiced law since '66 and lived in Silver City since 1872. He had known the plaintiff three years. Witness testified that he himself had occu-

pied five or six public positions in New Mexico; had been probate judge of the county, United States commissioner, register in bankruptcy, member of the Legislature, and member of the county school board. Witness further testified that a little after the burn-
62 ing of the hotel he was in La Mesilla, at the land office, where he was introduced to a man by the name of Dargan, who approached him on the subject of the burning of the hotel and asked him if he knew anything about the circumstances. This was at Deming. Dargan told witness that he had left his valise in the sleeping car; that it had been lost, and that it contained valuable papers connected with this insurance; that he came representing the insurance companies and came from Dallas, Texas; that Dargan requested witness to accompany him to the deputy sheriff to get aid in recovering his lost property, and that Dargan told witness he supposed the company would have to pay the insurance, but he intended to go to Silver City and inquire into it first, and he was considerably troubled about the loss of his papers. When witness returned to Silver City he again met Dargan, who informed witness that he had not recovered his papers, but that he could get copies enough to enable him to transact his business; that he was undecided as to whether the company would pay the insurance or rebuild the hotel and
63 place it in as good condition as it was before the fire; that he thought the company could rebuild cheaper than to pay the insurance. Witness testified that Dargan represented himself as the agent of the companies, sent out to Silver City to adjust their liability. Witness further stated that he himself was frequently at the hotel in company with Wright, Roodhouse and Edwards, or some one of them, or possibly all of them, because he was one of their attorn*ies* and interested in their enterprise, and partly influenced also by curiosity to examine the building; that he was frequently about the premises from the time of the completion of the building down to the fire, and was present when it was destroyed; that the reason he was there was because it was necessary either for himself or Mr. Bell, his partner, to advise the parties erecting the building as to whether or not they had conformed to the plans and specifications in the contract for erecting the building, and to advise them that
64 the building should be turned over by sending the keys to the parties for whom it was built. Witness testified that one room was occupied and possibly more. One was occupied by a colored man, and a man by the name of Graham was also in a portion of the premises; also that a family by the name of Crawford was in one of the rooms for a while; that Graham and the colored man were both employed by the plaintiff and were employees on the premises; that the building destroyed was built for a hotel by contract between Wright, Roodhouse & Company and Evans & Holt, but never was occupied by Evans & Holt as a hotel, for the reason, first, that they would not accept the keys, claiming that the plans and specifications for the building were not carried out; and, secondly, because the firm of Evans & Holt were going to pieces and had no means to furnish the building as a hotel should be furnished. Witness was of opinion that the hotel was built in

accordance with the specifications in the contract for the erection of the same. He also testified that John Graham
65 was at the fire endeavoring to save the effects inside the building and to save the lumber of the windows and doors, window-sashes, and all effects stored in the room, and that Graham acted as a leader in trying to extinguish the flames. Witness testified that among the things he saw carried out of the burning building was a keg of powder. He said the facilities for extinguishing fire at Silver City were extremely poor, and he thought the fire started in the southeast corner of the building, in the second story. Witness did not know there was a keg of powder there before, and whether the keg contained powder or not he knew only from information that came from others; that some gun or pistol cartridges *which* exploded in the fire after the building had nearly burned down. Witness believed the property belonged to David Wright at the time of the fire—such was his recollection—and he believed that John Graham was Wright's agent. Witness thought the value of the building was from ten to twelve thousand dollars.

On cross-examination witness testified that he remembered
66 definitely that Dargan represented himself as the agent of the companies, with authority to inquire into the circumstances of the fire and its cause and to adjust, and that he was undecided as to what the companies would do. Of his own knowledge, witness knew nothing about where Graham slept, whether in the building or out of it, and all he knew was from general report. He never was in Graham's room, but saw him frequently about the building, and understood he was the agent of the owners and had charge of it. The building was not occupied nor used as a hotel at any time after July, 1881, up to the time of the fire. Witness stated that he used the term owners in his testimony in connection with the building — Benjamin Roodhouse, Shelton Edwards, and David Wright, but, to the best of his recollection, the property had been transferred to David Wright before it was destroyed by fire, and, according to witness' best recollection, the deed to Wright was absolute in its terms, and if there were any private motives or secret trusts by which Wright took the property other than as
67 sole owner, such was not disclosed to the witness or Mr. Bell, his partner; that Shelton Edwards had stated to witness that he had a wife in Georgia. Witness knew nothing of the value of the building as a lumberman or as a contractor, and all he knew was in connection with the drawing of the contract for the building. Witness had built one house himself.

Plaintiff next read the deposition of Charles A. Newton, who testified that his age was thirty-three and he had resided in Silver City, New Mexico, since 1880. In the spring of 1882 he was introduced to a man by the name of Dargan, who said he was there in the interest of the companies insuring the Carrolton Hotel, and wanted to ask the witness some questions regarding the fire. Witness declined to state anything until Mr. Williams had assured him that Dargan

was the proper person to reply to. Dargan had told witness that he was a person sent by the company to adjust the claims of the
68 policy-holders. Dargan asked witness whether when he first saw the fire he thought it was of incendiary origin, but witness had declined to state so, when Dargan assured witness that if he would help him he would be very much obliged, as he was an adjuster and wanted to get all the information he could. Witness was present at the burning of the hotel, and got there soon after the fire was discovered. He saw two persons standing in front of the building. He entered the room below while the fire was burning through the ceiling from the second floor. The hole burnt was about two and a half feet wide by three feet long. Witness then went upstairs and tried to reach the room where the fire was confined, but the smoke was so dense he could not get through. Witness came back and went through the house to the back door, burst it open, and tried to find an ax, when he saw Graham standing at the gate between what was known as the office and the hotel building and asked Graham for an ax and Graham
69 said there was none. He then asked Graham for a bucket and Graham said there was none. Witness testified that if he had had an ax at the time he first went upstairs he could have stopped the fire in a few minutes as it was at that time. In about half an hour a number of persons gathered about the building and saved such property as could be taken out of the lower story. The fired burned quickly as soon as it had burned through the outside, and when the roof caught fire it was impossible to save it. While the roof was burning and the ceiling of the lower story witness went through the lower part to find anything else that could be saved and found a keg of powder known as black powder; also a coffee sack containing eight or ten sticks of giant powder. These witness took to the window, the can or keg he rolled out and the sack he threw out. When witness first saw Graham he was standing
70 by the gate referred to, some seventy feet away from the hotel, looking at the smoke as it was coming out of the roof. After witness inquired for the ax Graham said there was no use trying to save the building. Afterwards Graham hustled -round and assisted in getting some of the property out. After witness got the powder out he heard a shot and stopped to see where it came from, and in a moment there were fully half a dozen of them, and they were in an upper southwest room. Witness thought they were cartridges, as the explosions continued for some time. It was customary for people to keep fire-arms on the premises in that country. John Graham had the keys of the building one Sunday a short time previous to the fire, when witness was there, and offered to let him go through the building, so that witness took it for granted that he was in charge of the building, though he did not know.

On cross-examination witness said it was perhaps fifteen
71 minutes after he heard the cry of fire first before he reached the building, and it was some ten minures after he got there before he saw Graham and asked him for the ax and bucket. After witness spoke to Graham, Graham followed witness to the rear of the

building, Graham going on to the rear and witness going to the dining-room to break it in. Witness thought the fire could have been extinguished by proper efforts on the part af Graham when witness reached the building, as the fire was then confined to a small space in one room, and had Graham furnished witness with an ax he could very easily have extinguished the fire. The building was in close proximity to occupied residences in all directions. At first when he saw Graham, witness said, Graham was simply looking on, a fact which surprised witness, and, after a number of people arrived, Graham seemed excited and ordered the men to save the property.

72 The building had not been occupied for hotel purposes at any time, to witness' knowledge, between its construction and destruction.

On redirect examination witness, when asked how he could have extinguished the fire with an ax, replied that he found the door opposite the stairs to the left locked, and found the door on the right also locked, and that if he could have opened the door it would have relieved the smoke from the hallway, and that then he could have gone in and cut round the fire. Witness said if he could have got the door open in the room next to the room where the fire was he could have got into the room where the fire was. The doors might have been forced with the foot, but witness did not want to incur the smoke unless he was ready to work with an ax.

Plaintiff further read the deposition of Robert Black, who testified that his age was forty-three, business a builder and contractor, and residence at Silver City, N. M., where it had been for eleven years. He had had a good deal of experience in building in Silver City and

73 had built about three-quarters of all the houses there. Witness had nothing to do with the building of the hotel in question, further than furnishing about half of the building material. Williams had informed witness in the hotel that Dargan wanted to see him, and witness afterward met Dargan on the street in Silver City, about a month after the fire, when they went together to the post-office, where Williams was. Williams introduced Dargan as an adjuster of both the insurance companies. Dargan said he came there to adjust the loss, and wanted to know if witness was a builder and contractor, and if he could employ witness to estimate the loss and what it would cost to rebuild the building, stating that if the building could — be replaced for the amount of the loss he was instructed by the companies to adjust it, and if the building could be replaced for the amount of the insurance he was instructed to do so, and even to do so if it cost a little more. Dargan said he proposed to replace it if possible. The building referred to was called the Carrolton Hotel, and Dargan wanted to know of witness if he could

74 get up plans. Witness replied that he had not time, and preferred that he should get some one else. Witness said that Mr. Swain, with the assistance of Graham, made plans which, upon completion, Graham handed to witness, who started upon an estimate, but before it was completed Dargan said he had to leave in the morning, and that witness should hand his estimate on the building, together with the bill for his work, to Mr. Williams.

Witness did so. It was understood by witness that Dargan was agent for all parties concerned, but witness knew nothing further about the matter except that neither the companies nor Mr. Dargan had paid his bill. Witness did not recollect exactly the estimate he made, but thought it was ten thousand five hundred dollars, which witness thought was a reasonable estimate, and fifteen or twenty per cent. less than the building could have been built for at the time it was originally constructed. Witness thought the building in question cost to build between twelve and fourteen thousand dollars. He had never seen the plans and specifications since they were forwarded to the company. At the time of testifying witness was mayor of Silver City. He had had some experience for about five years in adjusting insurance losses.

75 On cross-examination witness said he never saw the plans and specifications on which the Carrolton Hotel was built, and he did not know whether the plans and specifications furnished by Graham and Swain were the same as the original plans and specifications or not. Witness did not examine the building while in course of construction or after its completion so as to form an approximate estimate of the cost of its construction, but he would undertake to guess the cost within five per cent. of any building in the county. He did not know what the actual market value of the building in July, 1881, was or at the time of the fire, but stated that the question of location had a great deal to do with that of value. He said that the old residents objected to that locality, and the lessees, who were expected to take the property failed, and refused to take it, but witness thought if they had taken it according to contract the hotel was worth the amount he had stated as the cost. Witness did not know exactly the cost of the material

76 used in the construction of the building nor the character and amount of it, but the hotel company paid him about three thousand dollars, and witness knew that material was bought cheap, and that Mr. Edwards was a very careful man, basing his purchases upon the best possible prices and getting all the competition among the dealers throughout the county that he possibly could. The finest and best material used in the construction of the hotel were purchased in Chicago and brought there via San Francisco and Shakespeare. It could not be had in Silver City. The same material could be had at a better price or shipped in a much shorter time now than when the hotel was built. It would cost 20 to 50 per cent. less now.

Plaintiff further read the deposition of Thornton Turner, who testified that he was thirty-one years old; resided at Silver City; knew the plaintiff and commenced working for him in January, 1881, and worked for him the whole of that year. John Graham was in Wright's employ during the same time. Witness was the second person that discovered the fire at the time the hotel burned. He was sleeping in the kitchen of the hotel, down-stairs on the lower floor, and had been sleeping there about a month before that. Mr. Edwards had told the witness he could stay there until they sold the property. Mr. Graham afterward told witness to go and

sleep in the kitchen of the hotel, as he was going to clean the
77 house up. At the time of the fire witness was working for Hardee, up town; had no conversation with plaintiff about not occupying the premises any more than that plaintiff told witness they would be back before long and employ him if he was out of employment. Witness had no key to the kitchen of the hotel. A man by the name of Solomon slept there at the same time, and he carried the key to the kitchen. Solomon slept in the dining-room and witness slept in the kitchen. Solomon was the first to give the alarm of fire. He waked up the witness and said the hotel was on fire. Then one could just see a small light shining into the dining-room window. Witness ran over and waked up Graham and told him the hotel was on fire. Witness and this man Solomon got two buckets of water, went into the hallway and shoved the door, and it was open. They went to the top of the stairs, but could get no further for the smoke. No one else had got there then. Witness then went out on the street and gave a general alarm of fire.

78 On cross-examination witness said he did not know Solomon's first name, and did not know by what authority he was occupying the dining-room. He had been staying there for about a month. The house Graham occupied, belonging to the Carrolton Company, was some distance from the hotel, and was a private building where they all stayed when in town. By all he meant David Wright, Roodhouse, and Edwards. Wright and Edwards had gone East about two months before the fire.

Plaintiff further read the deposition of George Henderson, who testified that he was thirty-nine years old and his business was a mining superintendent at Silver City; knew the plaintiff and Graham. Graham had worked for Wright in the mills and Georgetown mines. When the witness returned from New York he was appointed superintendent of the mining property of the Carrolton Mining and Milling Company. At the request of Edwards he gave Graham the use of a spare room in his house, which was the office of the Silver City Mining and Milling Company, formerly the Carrolton Mining and Milling Company, graham was con-
79 stantly consulting with witness. Graham acting in the capacity of agent for Mr. Wright. Graham would speak of letters from Wright referring to the fire and other general topics. Witness thought it was on March fourteenth he was appointed by Wright as agent, with a general power of attorney, and thereupon the agency of Mr. Graham ceased. Witness knew that Graham was considered agent at Silver City of Wright, Roodhouse and Edwards, from the fact that he recommended to these gentlemen the foreman of their mill, and the foreman was not entrusted to pay the hands, while Graham was, who acted in general as their agent. Witness was not in the city at the time of the fire. Witness was authorized by Wright and Edwards to pay the sum of a thousand dollars for the apprehension and conviction of the incendiary, and he had always tried to find out the person. The property rescued from the fire was worth less than a thousand dollars. At the time of the fire

Edwards and Roodhouse were in New York and Wright was in Carrollton, Illinois, as witness believed. At the time of the
80 fire Edwards was organizing a stock company or something of that sort, in New York city, to furnish and run the hotel.

On cross-examination witness stated that Edwards authorized him to offer the reward of a thousand dollars for the apprehension of the incendiary, in New York, the same day or the next after the fire, and directed witness, as he was starting back to Silver City, to learn the origin of the fire, at the same time authorizing the witness verbally to offer a thousand dollars to find the person, and that afterwards, when told what Edwards had offered, Wright said he would stand by the offer.

Plaintiff further read the deposition of Nathaniel Bell, who testified that his age was thirty-six; he was a miner, and lived in Pinus Altos, Grant county, N. M. He had been a dealer in lumber for four years eleven miles west of Silver City. He knew the Carrolton Hotel property that was burned down and had furnished lumber for the hotel building to the extent of about thirty-five or forty thousand feet. Witness thought he got between nine hun-
81 dred and a thousand dollars for the lumber. Mr. Hartford furnished the timber. Their value the witness did not know. Witness was through the building during its construction, but was not there after it was finished. He would judge the building cost between thirteen and fifteen thousand dollars. He did not know the actual cash or market value of the building at the time of the fire, as he didn't keep posted on the increase or decrease of value. The value of the ground he did not consider in his estimate of the cost of the building.

Plaintiff further read deeds from Benjamin Roodhouse and wife and Shelton Edwards and wife to David Wright of the property in question, the material portions of which are as follows:

Both deeds recited a consideration of seven thousand dollars in hand paid by David Wright and remised, released, and forever quitclaimed to plaintiff, his heirs and assigns, forever all title, interest, and estate, legal and equitable, in and to the following premises, with all the appurtenances and hereditaments thereunto be-
82 longing, situate, bounded, and described as follows, to wit: Lots number one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen, in block number fifty-nine, as authenticated by the Kidder survey, and block number one hundred and fourty-four, as designated by the new survey of John R. Frazer, located in the town of Silver City, Grant county and Territory of New Mexico.

The date of the deed from Roodhouse and wife was May 31st, 1881, the date of the acknowledgement of the signature of Roodhouse being July second and that of his wife May thirty-first, 1881.

The date of the deed from Edwards and wife was May 31st, 1881, and the date of the acknowledgement of the signature of Edwards being July second and that of his wife May 31st, 1881.

The signature of Mrs. Roodhouse was acknowledged before Leander R. Lakin, county clerk of Greene county, and that of Mrs. Ed-

wards before Seth F. Hanchett, clerk of the probate court of Cook county, Illinois, while the signatures of Roodhouse and Ed-
83 wards themselves were acknowledged before James Corbin, a notary public of Grant county, New Mexico. Defendant thereupon in open court conceded that the title of the property insured and the real estate described in the deeds of Edwards and Roodhouse to Wright was in Wright, Roodhouse, and Edwards at the date of those deeds.

At this point plaintiff closed his testimony; whereupon the defendant, to establish the issues on his part, introduced and examined certain witnesses, who, having been first duly sworn, testified as follows:

Defendant's Side.

Defendant first introduced Ichabod M. West, who testified that he was acquainted with David Wright and Mr. Dargan; had known Wright since the latter part of 1880, at Silver City, N. M. Witness lived in Silver City from October, '80, till about August 17th, 1881. He knew all the members of the firm of Wright, Roodhouse & Company and had business relations with all of them, more or less, having worked for the company in charge of the construction of their quartz mill, and he was with them in the house a great deal. They had their office at first in the Johnson building, which was
84 afterwards a part of the Carrolton Hotel, after which their office was in the Frazier building. They had another office down near the Carrolton Hotel, built about the time the hotel was being built. Witness made the plans and specifications for the Carrolton Hotel at the instance of Shelton Edwards, and talked them all over with Wright and Roodhouse in the back room. The hotel was built for Wright, Roodhouse & Co. Witness was an engineer and followed general construction; understood making drawing plans, specifications, and estimates. He commenced the drawings for the Carrolton Hotel in March, '81. They decided to build the hotel in March. They acquired the ground from one J. R. Johnson in November, '80. The hotel occupied a part of the block, but did not cover half of the ground purchased from Johnson. Witness understood from Wright, Roodhouse & Edwards that they paid near three thousand for the house and block. The house then on the ground was adobe and formed afterwards a part of the hotel. Adobe meant made of brick sun-dried, about four inches thick and twelve inches long. The plan included the adobe building,
85 which was then there, to which was built an addition on the ground floor, and on top of all was put another story, making the complete hotel. The new part was stuccoed—that is, lathed and plastered inside and out. The lumber used in the building consisted of studding, flooring, and rafters, but there were no weatherboards nor ceiling. Witness' original estimate of cost was sixty-one hundred dollars. He thought the building cost something more than the original estimate, for other work was put on to the extent of a thousand or twelve hundred dollars. Witness heard Wright say that the building cost him more than the estimate, but Wright

did not say how much more. The contract price for the lumber in the mill-house was twenty-four dollars and seventy-five cents a thousand, delivered on the ground. It took between twenty-five and twenty-six thousand feet of rough lumber for the hotel, not to speak of finishing lumber. Other lumber was used to the extent of thirty-five thousand feet. Flooring cost thirty-five dollars a thousand. Witness thought
86 the whole property on the first of July, 1881, was worth nine thousand dollars and the hotel building was worth from eight to nine thousand without the improvements that had been put there, including some walls put up on the outside with a stone fence around. Witness had lived in the West about thirty years and was familiar with the building materials and buildings in that country. The hotel in question was being built for use as a hotel by Holt and Evans, under a contract to take it from Wright, Roodhouse and Edwards when finished. They were to take the whole hotel property. When the hotel was finished witness carried the keys to Holt and Evans, at the request of Shelton Edwards, about the last of June or the first of July. Witness did not think the property had been insured at that time, but it was then completed. He understood that it was insured after the first of July. He had heard Wright speak of it. Holt and Evans refused the keys and witness returned them to Wright. At the time witness tendered the keys Holt said he didn't want them, as the hotel was not what he contracted for, and witness reported the reply to Wright. Witness did not think
87 Wright made any reply when informed what Holt had said, but took the keys. Witness heard a conversation between Wright, Roodhouse and Edwards about transferring the title of the property to Wright; the conversation was in the east room of the adobe building and concerned the trouble they had about the property which they had transferred to the Carrolton Milling and Mining Company, and about Mr. Edwards having a difficulty in getting his wife to sign the deed so as to get it back in time, and they thought it would be better to transfer the legal title to Mr. Wright, as he had no wife, and then if transferred at any time the transfer could be made without waiting for the signatures of Mrs. Roodhouse or Mrs. Edwards. Witness heard them speaking about this at different times and as late as April, '81, at which time the hotel was being built, and an arrangement had been made to transfer it to Holt & Evans when completed. The hotel proper covered about eighty-odd feet in length by forty-two in width, which was only a small portion of the block. Mrs. Roodhouse and Mrs. Edwards were
88 not at Silver City at that time. Witness heard a conversation between Wright and Edwards in front of the Carrolton House, when they were speaking about the hotel not being taken, when Edwards said if Tom Holt did not take the hotel according to agreement and pay for it the insurance companies would, and Wright in reply said, You shouldn't talk that way; it will get us into trouble if the building is burned; very indiscreet to talk that way. This was in July, about the time the keys were refused by Holt, and they were talking about that fact. Witness did not work for Roodhouse and Wright after the first of June, but did for Ed-

wards. He did not know whose agent Graham was. Graham was working for Wright, Roodhouse & Edwards on the 7th of January, as far as witness knew. Witness put in some pipe at the hotel, at the direction of Edwards, about the middle of June. There were no stuccoed walls in the building. Stucco is made of lime, plaster, and marble dust. The specifications called for such work, which was put on of lime and sand and rubbed down. The studding, floors, roof, and joists were of wood, and outside and inside lathed;
89 inside plastered and finished and outside plastered and rubbed down.

On cross-examination the witness said he went to work for Shelton Edwards about June, '81, when he was employed about the mine. Wright and Roodhouse were there frequently, but witness was not working for them. Wright was around frequently. Roodhouse was not there so much. Wright left to go back to Carrollton about July. Witness remained in Silver City till the seventeenth of August, and then went to San Francisco; then to San José, Gautemala. Witness got back to San Francisco about the tenth of February, '82, remained there five days, and then went to Portland, Oregon; thence to Lake Pendril, Idaho; thence to Deer Lodge, Montana; thence to Phillipsburg, Montana; thence to Butte City, where he remained about ten days. He next went to Bidford Canyon, Idaho, and stayed there about two months. He then went to Lehigh Junction, and was there until the fourth of August, '82. He then went to Salt Lake, and from there to Ogden. He then went to Denver; got there about August, '82, and remained five days. He then went to Ruble, where he stayed twelve
90 days, and thence to Deming, N. M., and from there to Silver City, where he arrived in September. There he stayed four or five days, then went back to Deming, and from there to Albuquerque, where he stayed until the last days of September. From there he went to Nut Station, on the Topeka & Santa Fé road, and was there till in December, when he went to El Paso, Texas. From there he went to Fiesta, and from there to Texarkana, where he remained four weeks. He then went to Longview, Texas, and from there to Jefferson; thence to Austin and back to Jefferson; thence he returned to Austin and went to San Antonio; was in San Antonio about a month. He then went back Austin. This was in the last of April, '83. He then went back to San Antonio and stayed there until June, '83. He then went to Washington city for six days, and then returned to Austin, from whence he went to Dallas, where he had remained most of the time since. The first work of witness in Dallas was to put machinery in the elevator. He was at Waxawatchie twelve days and then returned to Dallas. His family never lived in Dallas. Witness had been in
91 Fort Worth some and at Dallas ever since, except in going back and forth; had been in the construction of the new Windsor Hotel after the middle of February. His family was in Boulder City, and, he thought, had been there all the time. Witness went to Silver City about the last of October from Tombstone, Arizona, where he had been about a month, and to which

place he went from San Francisco; that was in '80; went from San Francisco to Portland; went to San Francisco from Ogden at that time, to which place he had come from Denver, and to Denver he had come from Boulder City. He came from New York city to Boulder City; had been in New York a few days—not so long as — week; was in Black Hills from 1875 to July, '80—not all the time, but was in and out. He was mining and mill-building; knew Shelton Edwards at the Black Hills. The first he knew of him was in the winter of '77 and '8, when he was not mining but keeping a saloon at a place called Central. Before going to the Black Hills in '75 witness lived in Boulder City, to which place he went in '73 or '4 from Kansas City, Missouri, to Denver, and from Denver
92 to Boulder City. Witness did not know that he could fix the date when he last saw Wright in Silver City, but thought it was in the month of July. Witness did not know that Shelton Edwards held a power of attorney from Wright. Edwards died in New York March 15th, '82, as witness recollected. Witness was first in the employ of Edwards June first, '81; was not employed by him at any time after he left; was then employed for Edwards about a month or more. Witness thought Edwards had property; the first time he saw him he talked to witness about directing a quartz mill. He had an interest in a quartz mill in Silver City, but did not know that he ever got a nickel out of it. He made some money out of a sale of a portion of a silver mine a mile from Silver City. In relation to the hotel, the lots were eighty-odd feet long and between forty and forty-two feet wide in the widest part. Kitchen and dining-room were built separate, four or five feet from the main building, connected by a gallery above. Witness did not draw the plan for the kitchen. The shingles for the building cost
93 about two thousand dollars; they were all received through Meredith & Aleman. Witness could not state how many rooms there were in all exactly, but as nearly as his recollection went, there were thirty-nine.

On redirect examination witness said that on his journeyings as described he was part of the time working at building and part of the time doing nothing. Witness understood that Edwards was a partner in the business with Roodhouse & Wright at Silver City, and was such at the time the building of the hotel was begun, as he understood. Witness made the estimates at the instance of Mr. Edwards. He knew that Edwards out there always had money. He knew he had a silver brick made of silver which he got from some private individual and which was worth nearly three thousand dollars.

On recross-examination witness said the brick came out of a mill, but he did not think it came out of any mine.

This witness, being recalled the next morning, said that the building which contained the dining-room constituted between twenty-five and thirty per cent. of his whole estimate, while the
94 main building constituted from seventy to seventy-five per cent. Witness during all his travels had supported his wife

and family. He had a boy at Dallas who was between eighteen and nineteen years old.

On recross-examination witness said he had not seen his wife since 1880. The number of his children was not less than eight, married and all. The doors and sash used in the hotel building were made in Chicago; could not tell what they cost.

The next witness called by the defendant was J. T. Dargan, who testified that his residence was Dallas, Texas, and business that of an insurance agent, representing five companies in the Southwest, among which were the Continental of New York and the Fire Association of Philadelphia. He had been in the business between twelve and fifteen years, and had been at Dallas, he thought, pretty near twelve years; had been in the business of fire insurance exclusively. The first he knew about the property in controversy was by daily report from the sub-agent at Las Vegas, N. M., T. B. Mills, giving
95 an account in the order of business. That report was accompanied with an application, which witness had since lost, together with his valise and other papers, while on his way to Silver City. Witness had made every effort he could to recover the valise and papers—had offered a reward and spent two days in search, but without success. Witness said he remembered the points in the application, that he thought important, pertaining to the loss, as he had compared the application with the policies, and shortly after the loss had recalled and made a memorandum of what he could remember. Question ten in the application, which inquired, Are the premises directly under the control of the occupant, and for what purpose? If not, give full particulars as to occupancy and control—witness answered as follows: To be occupied within sixty days as a hotel by tenant. The value of the property as set forth there was ten thousand on one building and five on the other, the total value being stated at fifteen thousand dollars. To the
96 question whether there was any other insurance witness said the application answered, none; and as to title the answer was, fee simple, without any explanation. The name signed on the application was David Wright, and the date July first, '81. On the back of the application was a statement in writing as follows: Party leaves in a few days for the East to buy furniture and fit up the hotel in business style.—David Wright. Party was not named. To a question, Suppose the application had said the building was to be vacant? witness replied risk would not have been taken. At Silver City witness hunted up the deputy postmaster, whom he had known before at Dallas, and of Bell & Wright he inquired the value of building and circumstances of loss, interviews there being almost entirely with Bell. Mr. Williams, he thought, introduced him to the firm who were acting for plaintiff. Witness went to see policies deposited in a safe, and apparently not under control of Bell & Wright, but of Graham—at least, Bell & Wright did not appear to have them in their possession, though they might have had
97 access to them. Witness told Bell & Wright that he came to investigate, and if possible to adjust the loss, but that he never told them that he came merely as an adjuster for both parties.

He was introduced as a general agent by Mr. Williams of the insurance companies, and to the best of his recollection his power was never discussed. The first man he met representing Wright was Graham, with whom he conversed about the loss, and had frequent interviews while there. Witness took Graham's affidavit. As to whether witness first spoke to Black or to Bell & Wright he did not know, but he let them know he wanted the data connected with the construction of the building, so as to arrive at the value of it, and in that view he wanted the plans and specifications, but he never asked for the ground plan, as he saw that for himself when he went and examined the location. Bell & Wright said there were plans and specifications on file with Aleman, and witness, introduced by Mr. Bell, he thought, went over and asked to see them. The
98 plans and specifications were shown him, but he was not allowed to take them away, and after he had been allowed to look at them for a few minutes they were rolled up and put back in the vault, Meredith or Aleman claiming them as their property, and saying that they had some trouble with the hotel firm, and therefore could not risk letting the papers go. The policies being exhibited to witness were recognized as the papers he saw in Silver City, where witness pointed out to representative of Mr. Wright the clause as to furnishing proofs of loss and plans and specifications. Witness had asked Williams who would be a good builder in town. Bell said that West & Lusigman were both absent, and witness was introduced to a man named Black, running a planing-mill, who said he had furnished some of the material for the hotel building, and witness told Black that after he got the plans and specifications he would call on him for an estimate upon them. Black voluntarily told witness that the hotel building was worth five
99 thousand dollars and not over that. Witness told Bell & Wright distinctly that he denied liability on account of the loss. Witness never received either plans or specifications or proofs of the loss, but did get what purported to be a bid from Black, which was contained in about three lines. As to Mr. Ginn, whose deposition was read by the plaintiff, he was introduced by the sheriff at Deming to a man, and when he got to Silver City he had mentioned it, but had not thought of it since. He could not have told Ginn that he intended to pay the loss before investigation. Witness denied having said to anybody in Silver City, after learning the circumstances of the loss, anything whatever that waived the rights of the companies. When witness visited Silver City he had to use stage from Deming fifty or sixty miles. He admitted the correspondence which had been read between himself and the firm of Bell & Wright, but said he had received no instructions to settle the loss.

On cross-examination witness claimed to have produced the exact language of the application as near as he could, and that he
100 had done it not entirely from memory, but partly from a memorandum made at the request of Phillips & Stuart, counsel for the companies, shortly after the loss occurred. The copy from which witness testified in court had been prepared within

thirty days, and the witness finally admitted even within six days previous, at the Southern Hotel, in St. Louis.

Defendant next called Oscar W. Williams, who testified that he was now living at Fort Stockton, Texas, but in '81 and '2 he lived in Silver City, N. M. He had been educated as a lawyer, and went from Carthage, Hancock county, Illinois, to Dallas, Texas, first, and thence to Silver City, N. M., in 1880. In 1881 he was deputy postmaster at Silver City, and continued to be so for about two years. He knew of the Carrolton Hotel and also of the firm who built it—a firm which, he judged from the remarks of the members, was composed of David Wright, Benjamin Roodhouse, and Shelton Edwards. He got acquainted with those persons in the spring of '81. They had a mine and mill at Silver City and built two buildings there
near each other—one the Carrolton Hotel, and the other
101 called the Dorsey place, he believed. They were engaged in
litigation, but, so far as witness knew, not in the spring of '81, and all the witness knew as to that was that he had issued an attachment in January, '82, as deputy in the office of the United States clerk there. Witness would suppose the Carrolton Hotel was completed in June or July, '81, and he saw it at least every two days and knew that it was not occupied, opened to the public, or furnished as a hotel at any time whatever. After the building was finished witness knew that Edwards gave directions to Graham in respect to it. Witness had met Mr. Dargan in Dallas, Texas, some time in '79, and saw him in Silver City about a month after the fire, when he took him up to see Bell & Wright; could not recall what was said. Witness also introduced Dargan to Black, but Dargan did not employ Black in his presence to do anything, though some reference, which he did not remember, was made to plans and specifications, but which witness thought was to the effect that it would be difficult to get plans and specifications, because they were in the hands
of persons who did not want to give them up, and, besides,
102 the building was built a little differently from the plan. Mr.
Black, as witness remembered, was to deliver to witness an estimate based upon whatever plans and specifications he could get upon the building, but Mr. Black never handed witness an estimate, though he did hand him a bid, which was in writing, and which the witness handed back to Mr. Black afterwards, though not till he had forwarded it to Mr. Dargan, who returned it, saying that what he wanted was not a bid, but a detailed estimate of the cost. Graham had signed a statement already prepared and attached to it his affidavit before the witness as a deputy clerk. Mr. Dargan had told Graham that he wanted the paper for future use. Witness did not think Dargan used the term adjust much, because that was a term new to him at the time, and witness thought he would have remembered it. Dargan came from Deming to Silver City, 55 miles, by stage. There was no railroad to Silver City then. The railroad was built there in January, 1883, or in March, 1883.

Here defendant read the deposition of T. B. Mills, with the exception of the last answer to the last question, which was withdrawn. Mr. Mills testified that he was forty-three years old, his occu-

103 pation real estate and bond broker, and his residence Las Vegas, N. M. Witness knew the Continental Fire Insurance Company and the Fire Association of Philadelphia, as he had been their agent for two years, and he knew David Wright through his application for insurance. In July and August, '81, he lived in Las Vegas and was engaged in the insurance and real estate business, and in July of that year he received an application from David Wright, through T. Park Butcher, on a hotel in Silver City, the value of which, as set forth in the application, was fifteen thousand dollars, and he asked for ten thousand insurance. The application was fully and clearly filled out and signed by David Wright. It was written upon a blank of the Fire Association of Philadelphia. It stated that the property was unencumbered in every way, and was to be occupied as a hotel within sixty days, and also that at the time the application was made the party was just leaving for the North to buy furniture to fit up the hotel; that it was very valuable and paying property, and that there was no fear of incendiarism.

Upon this application witness issued two policies of five thou-
104 sand dollars each—one in the Fire Association of Philadelphia and one in the Continental Fire Insurance Co. of New York. The application was made a part of each policy. The application was signed by David Wright and forwarded by witness to Dargan & Trezevant, State agents for the companies named, at Dallas, Tex., together with the monthly report of the witness respecting the two policies in question. Witness stated that David Wright in his application claimed to be the owner of the property.

The defendant also called David Wright, who identified the deeds heretofore referred to in this record by Shelton Edwards and Benjamin Roodhouse to himself, but was unable to testify as to the handwriting of the signatures. Witness was in Silver City on the second of July, '81, but has no personal knowledge as to the writer of the deeds, though he thought they were written by Edwards.

At this point defendant rested.

Plaintiff in rebuttal went upon the stand and testified as follows:

DAVID WRIGHT recalled:

Plaintiff testified that on the first of May he contracted with Roodhouse & Edwards for the property—first of May, '81. He made application for insurance in the Continental Insurance Co. of New York and the Fire Association of Philadelphia, the same companies whose policies were being sued on. The best of witness' recollection — that the entire cost of the building in question
105 was $14,000—of both buildings—and witness further testified that an ell kitchen was put on afterwards by himself, which cost about $1,300. Plaintiff further testified that at the time of the issue of the policies to him the buildings were worth the amount stated in the application. Plaintiff denied any such conversation with Edwards as that detailed by the witness West, to the effect that if Holt & Evans didn't take the property the insurance companies would. The plaintiff also testified that he gave Edwards a

power of attorney to look after the property after plaintiff had contracted for it and during plaintiff's absence. "I did not know any powder or other combustible material was kept in the hotel and never gave any one permission to keep it there. I am the sole owner of the entire hotel property and grounds; never parted with it since I bought out Roodhouse & Edwards, in May, 1881. The sash, doors, windows, and finishing lumber for the hotel were bought in Chicago, Ill., and had to be shipped from there to San Francisco, and from San Francisco to Shakespeare, and hauled from Shakespeare, sixty miles, by wagon to Silver City, N. M. Shakespeare was the nearest point to be reached by rail. Flooring and dressed lumber were dear in Silver City all the time, because it had to be shipped from the East in that round-about
106 way. The furniture and supplies for furnishing the hotel could not be bought in Silver City. Such things had to be bought in the East and shipped round San Francisco and Shakespeare. It would take all of six months to get the furniture to the hotel. Holt & Evans never gave up their contract and refused to occupy the building until the latter part of July, 1881. It was hard to lease it then."

At this point plaintiff rested, the testimony was announced finished' and the case closed.

The court adjourned to nine o'clock a. m. on Monday.

On the reconvening of the court the plaintiff proposed to go upon the stand again to testify with regard to the form of the application, whereupon defendant objected. The court overruled the objection; to which action of the court defendant then and there excepted.

Plaintiff then testified in substance as follows:

DAVID WRIGHT recalled:

Plaintiff said that, to the best of his recollection, the application in question contained no statement at all with reference to the occupancy of the hotel, only that it was to be used as a hotel. To the best of witness' recollection the statement in that respect in the application read as it reads in the policy. It didn't state anything as to the occupancy, only that it was to be used as a hotel.
107 On cross-examination witness had no recollection of language in the application to the effect that the building was to be used as a hotel within sixty days, and, to the best of his memory, he would say it was not true that it did so state.

On redirect plaintiff stated that he had first made known the fact of his recollection about the application since the adjournment of court on Saturday and between four and five o'clock on Monday morning, at the train.

Here the plaintiff rested and both sides announced the case to be closed, and the foregoing is a true statement of all the testimony offered in the case.

After argument, and before the case was given to the jury, the court was asked by the defendant to give the following instructions

to the jury: That, in view of the provision of the policy that the building was to be occupied as a hotel, the law implies the contract to be that it should be occupied within a reasonable time thereafter, and the fact, sworn to by the plaintiff, that between the 11th day of July, the date of the policy, and the 19th day of January, the date of the burning, the building had not been and was not at the date of the burning occupied as a hotel constituted such a delay in the time of occupancy as was unreasonable and such as in law avoids the policy, and the verdict of the jury upon that ground should be for the defendant.

This instruction the court refused to give; to which refusal the defendant then and there at the time excepted.

108 The court thereupon instructed the jury as follows:

The COURT: Perhaps the most important point in the case is the use of this building as a hotel. The policy provides that the application of the plaintiff for insurance shall be considered a part of the policy. The application has been lost and cannot be produced. The defendant, the insurance company, contends that the application provided that the building should be occupied as a hotel in sixty days. The plaintiff insists that there was no such limit. The jury are to decide from the evidence that has been heard on the subject what the provisions in the application are. If you should come to the conclusion from all the evidence applicable to the subject that it contained a provision that the building should be used for a hotel in sixty days, then the plaintiff would not be entitled to recover, because, when the building was burned, it was not operated as a hotel.

This is all I am inclined to say on that question.

There is a question made about the title to the property. The evidence shows that the legal title was in the plaintiff from the other gentleman, owners with him. That is enough, unless you believe from the evidence that he holds that title for the benefit of Roodhouse & Edwards. If he does, then he would not be entitled to recover, for the policy provides that he must be full and absolute owner of the property in order to recover insurance.

As to reasonable time, I will say to the jury that if there was no statement in the application as to the time in which the building
109 was to be used as a hotel, in that case it was the duty of the plaintiff to operate it as a hotel, or have it used as a hotel, in a reasonable time, and the question of reasonable time is for you to determine.

I believe there is a provision in the policy that no powder or combustible material be placed in the building while insured. If the jury should believe from the evidence that the plaintiff, Wright, or his authorized agent, authorized powder or other combustible material to be placed in the building, that would vitiate the policy and render it void.

And the defendant insisted that the court should instruct the jury, as a matter of law, that upon the facts of the case the verdict should

be for the defendant; and to the giving of the instructions given by the court and to the refusal of the court to instruct the jury as the defendant requested, the defendant then and there excepted.

And, inasmuch as the matters and things aforesaid do not appear of record, the defendant tenders this its bill of exceptions, which it prays may be signed and sealed by the said judge of said court; which is done accordingly.

S. H. TREAT.

110 UNITED STATES OF AMERICA, } *ss:*
Southern District of Illinois, }

I, John A. Jones, clerk of the circuit court of the United States for the southern district of Illinois, do hereby certify the foregoing to be a true and complete transcript of the record and proceedings in a certain cause lately determined in said court, wherein David Wright was plaintiff and The Fire Association of Philadelphia was defendant, as appears from the records and files of said court now in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Springfield, in said district, this 5th day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the 110th.

[The Seal of the Circuit Court of the United States for the South'n Dist. Ill.]

J. A. JONES,
Clerk United States Circuit Court,
Southern District of Illinois.

111 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

To David Wright, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in clerk's office of the circuit court of the United States for the Southern District of Illinois, wherein the Fire Association of Philadelphia is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties aforesaid in that behalf.

Witness the Hon. Samuel H. Treat, district judge of the United States for the southern district of Illinois, at Springfield, in said district this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and tenth year.

S. H. TREAT,
District Judge U. S., South. Dist. Ills.

David Wright, by James R. Wood, his attorney, hereby acknowledges service of the within citation this September 29th, 1885.

DAVID WRIGHT,
By JAMES R. WOOD,
His Attorney.

[Endorsed:] Fire Association of Philadelphia *v.* David Wright. Citation.

Endorsed on cover: S. Illinois C. C. U. S. No. 140. The Fire Association of Philadelphia, plaintiff in error, *vs.* David Wright. Filed October 16, 1885.

FILED
DEC 19 1888
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

Nos. 139 and 140.

THE CONTINENTAL INSURANCE COMPANY, OF NEW YORK,
Plaintiff in error,
vs.
DAVID WRIGHT.

THE FIRE ASSOCIATION OF PHILADELPHIA,
Plaintiff in error,
vs.
DAVID WRIGHT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

HENRY JACKSON,
Of Counsel for Plaintiffs in error.

GRAY & CLARKSON, PRS.

Before the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE CONTINENTAL INSURANCE COMPANY *vs.* DAVID WRIGHT. } No. 139.

THE FIRE ASSOCIATION OF PHILADELPHIA *vs.* DAVID WRIGHT. } No. 140.

BRIEF FOR PLAINTIFF IN ERROR.

The actions in the above stated cases were brought in the Circuit Court of Greene County, State of Illinois, upon two policies of insurance issued by the defendant companies. The first policy was in the Continental Insurance Company, was issued at Las Vegas, New Mexico, and covered $5,000 on "two-story adobe and wood-stuccoed shingle-roof hotel building, to be occupied for hotel purposes," from July 11, 1881, to July 11, 1882. The policy was dated July 11, 1881.

Printed record, pp. 4 and 5, No. 139.

The conditions of this policy, on page 5 of printed record, No. 139, provided that the policy should be void "if in said premises there be kept gunpowder," &c.

The second policy was in the Fire Association of Philadelphia, and was concurrent with that in the Continental. Under the sixth condition, printed record 140, p. 6, it was provided that the policy should be void "if any of the following named articles, or compounds containing any of them, be kept, stored, or used in or on the premises herein described, any custom or usage of trade or manufacture to the contrary notwithstanding, * * * gunpowder," &c. * * *

This policy was also issued at Las Vegas, New Mexico, on July 11, 1881.

The property covered by these policies was destroyed by fire on January 19, 1882, more than six months after they were issued.

The defendant companies failing to pay, actions were brought therein in the circuit court of Greene County, State of Illinois. The cases were removed to the circuit court of the United States for the Southern District of Illinois, the petition in each case stating "that the subject-matter and controversy in said suit is not upon a claim or cause of action arising out of any business or transaction in fact done in the State of Illinois, but is upon a claim or cause of action arising out of business and transactions in fact done in the Territory of New Mexico." (Printed record, No. 139, p. 13, and No. 140, pp. 11, 12.)

The bill of exceptions in each case recites (No. 139, p. 120, and No. 140, p. 17) that "it was stipulated and agreed between plaintiff and defendant, before the jury was impaneled, that under the plea of the general issue pleaded in this cause defendant might introduce any other evidence which might be introduced under notice of special defenses."

The cases came on for trial the last of January, 1885, and resulted in verdicts for the plaintiff for $5,750, on February 2d.

The first witness for the plaintiff was Joseph Lusigman, who testified, among other things (printed record, 140, pp. 19 and 20), that when the hotel was completed he slept in it, and kept his tools and baggage there; that when he repaired Wagner's building, occupied by Samuel Exstein, in Silver City, he found two small cans of Dupont powder and one large can of blasting powder about a quarter full. Exstein gave it to him and he took it to the Carrollton Hotel (the property insured), where he had his carpenter's bench on the ground floor in the southwest room of the building, which he was then using as his carpenter shop while working on the hotel, and witness used this room as a carpenter shop while he remained in Silver City; that no one knew of this powder being there but himself; that he had charge of the hotel himself after Wright went East, and Wright told him to keep an eye on things around there. Graham was then working a mine at Georgetown, but witness did not know whether Graham had the general management of the hotel at that time or not. Witness carried the powder to the hotel on his own responsibility; that the powder, when he came to examine it afterwards, had been wet, was caked and in lumps, and that parties who had intended to use it on a trip to Mexico refused to take it, or to take their chances among the Indians with that kind of powder. That the powder in the large can had also been wet. Witness threw out the two small cans, and put the large can back in his chest, and then went to a sack he had in there which contained giant powder and fuse caps. That the giant powder was the same as he had taken

from the Carrollton quartz-mill. That he had intended to use it in some mines he had in the country. He gave to the parties who went to Mexico all but four sticks of the giant powder and part of the coil of fuse and all the caps. That the giant powder was only in his chest a few days before he gave it to these parties. He had kept the same powder in a stone stable until he purchased a horse, but afterwards he removed the giant powder to his chest in the hotel. No one knew the giant powder was in there except himself and the party who went to Mexico. The other four sticks of giant powder and the remaining fuse he left on a window-sill in a room of the hotel adjoining the carpenter shop. At the time of the fire he had removed one tool-chest from the hotel, but his tent, pick, shovel, drills, and hammer, and the balance of his baggage, he left in the hotel, and also one tool-chest. That on the 12th and 13th of December, 1881, he quit sleeping at the hotel; that he went there a few times afterwards to see about the tools, and to get some if he needed them; that he had the keys to two rooms, and locked them from the inside; that he left the keys in the key-holes; that he was not at the hotel on the night of the fire, and did not know of it till 6 o'clock the next morning.

Plaintiff also read the deposition of John Graham, who testified, among other things, that he knew Wright and was in his employ; that he went to work for the company of which Wright was a member in 1881, and worked about twenty months, mining a portion of the time, and serving as a watchman in what was called the Carrollton Hotel, in Silver City, which was afterwards burned down; that he had charge of the property, and also of the house adjoining it on the north at the time of the fire; that he knew nothing about any powder being in the building; that he was at the hotel every night except the night of the fire; that night he was out a little late and went to bed with one Washington; that a darkey by the name Thornton and a Frenchman by the name of Lusigman, who plastered the hotel, were in charge of it by authority of witness; that he never gave Lusigman, or any one else, permission to keep gunpowder or other combustible material in or about the building, and never knew they were doing so; that he gave Lusigman and Thornton the use of a room in the hotel in consideration of their having an eye on the property in his absence.

Witness was shown a paper in the words and figures following, which he said he wrote, but claimed he just scribbled it off in his own office:

"I was watchman at the Carrollton Hotel when it was insured. Mr. Wright told me that I need not watch it any longer; that it

was insured, and he did not care whether it burned or not; that it was no good, and he hoped that some one would burn it in order that he could get the insurance. S. E. offered J. S. $300 if he would burn it. J. S. said that he would not do it; that he must get some one else. D. Wright did not own the property; it belonged to W. R. & Co." (Wright, Roodhouse & Edwards.) (Marked Exhibit A to Graham's deposition.)

Witness said that the Carrollton Hotel was not occupied as a hotel at the time of the fire.

On re-examination witness said that the writing (Exhibit A) was not written for any purpose at all, but was only a piece of scribbling. (No. 140, printed record, p. 22.)

On recross-examination he said that the initials S. E. and J. S. in Exhibit A stood for just those letters.

Plaintiff read the deposition of John M. Ginn, who testified, among other things (No 140, printed record, pp. 27, 28), that the building destroyed was built for a hotel by contract between Wright, Roodhouse & Co. and Evans and Holt, but never was occupied by the latter as a hotel for the reason, first, that they would not accept the keys, claiming that the plans and specifications for the building were not carried out; and, secondly, because the firm of Evans & Holt was going to pieces and had no means to furnish the building as a hotel should be furnished; that among other things witness saw carried out of the burning building was a keg of powder; that the facilities for extinguishing fire at Silver City were extremely poor, and he thought the fire started in the southeast corner of the building in the second story; that he did not know there was a keg of powder there before, and whether the keg contained powder or not, he knew only from information that came from others; that some gun or pistol cartridges which exploded in the fire after the building had nearly burned down; that Benjamin Roodhouse, Shelton Edwards, and David Wright had owned the property, but it had been transferred to Wright before the fire.

Plaintiff also read the deposition of Charles A. Newton, who testified, among other things (printed record, 140, p. 29), that about fifteen minutes after he first heard the cry of fire he entered the room below while the fire was burning through the ceiling from the second floor; the hole burnt was about two and a half feet wide by three long. He then went upstairs and tried to reach the room where the fire was confined, but the smoke was so dense he could not get through. He came back and went through the house to the back door, burst it open, and tried to find an axe, when he saw Graham standing at the gate, between what was known as the office and the

hotel building. He asked Graham for an axe, who replied that there was none. He then asked him for a bucket and Graham said there was none. If he had had an axe when he first went upstairs he could have stopped the fire in a few minutes. While the roof was burning and the ceiling of the lower story, witness went through the lower part to find anything else that could be saved, and found a keg of powder, known as black powder; also a coffee sack containing eight or ten sticks of giant powder. These witness took to a window the can or keg he rolled out and the sack he threw out. After witness inquired for the axe, Graham said there was no use trying to save the building. After witness got the powder out he heard a shot, followed by fully half a dozen of them, which came from an upper southwest room. Witness thought they were cartridges, as the explosions continued for some time. It was customary for people to keep fire-arms on the premises in that country. It was some ten minutes after witness reached the fire before he saw Graham and asked him for the axe and bucket. Witness thought the fire could have been extinguished by proper efforts on the part of Graham when he reached the building, as the fire was then confined to a small space in one room.

On re-direct examination, witness, when asked how he could have extinguished the fire with an axe, replied that he found the doors opposite to the stairs on the right and left locked; that if he could have opened the door it would have relieved the smoke from the hallway, and he could then have gone in and cut around the fire.

Plaintiff also read the deposition of Thornton Turner to the effect that he was the second person who discovered the fire; that he was sleeping in the kitchen of the hotel, downstairs on the lower floor. Mr. Edwards had told witness he could stay there until they sold the property. Witness had no key to the kitchen of the hotel. A man by the name of Solomon slept there at the same time and he carried the key to the kitchen. Solomon was the first to give the alarm of fire. Witness ran over and waked up Graham, and told him the hotel was on fire. Witness and Solomon got two buckets of water, went into the hallway and shoved the door, and it was open. They went to the top of the stairs, but could get no further for the smoke. Did not know Solomon's first name, nor by what authority he was occupying the dining-room.

All the witnesses for the plaintiff concurred in testyfiing that the building had never been occupied as a hotel from the date of its completion, in July, 1881, to the date of the fire, on January 19, 1882.

Defendant introduced Ichabod M. West, who testified, among other things, that when the building was finished witness carried the keys to Holt & Evans, at the request of Shelton Edwards, about the last of June or first of July. Holt said he did not want the keys, as the hotel was not what he contracted for, and witness reported what was said to Wright and returned him the keys. Witness heard a conversation between Wright and Edwards in front of the Carrollton House, when they were speaking about the hotel not being taken, when Edwards said if Tom Holt did not take the hotel according to agreement, and pay for it, the insurance companies would, and Wright, in reply, said: "You shouldn't talk that way; it will get us into trouble if the building is burned; very indiscreet to talk that way."

This was in July, about the time the keys were refused by Holt, and they were talking about that fact.

J. T. Dargan, for the defendant, testified among other things, that he was an insurance agent at Dallas, Texas, representing the two companies sued. The first he knew about the property in controversy was by daily report from the sub-agent at Las Vegas, N. M., T. B. Mills, giving an account in the order of business. That report was accompanied by an application, which witness had since lost, together with his valise and other papers, while on his way to Silver City. He had made every effort he could to recover his valise and papers, had offered a reward and spent two days in search, but without success. He remembered the points in the application which he thought important, as he had compared it with the policies, and shortly after the loss had recalled and made a memorandum of what he could remember.

To question 10, in the application, which was as follows: "Are the premises directly under the control of the occupant, and for what purpose? If not give full particulars as to occupancy and control." The answer was: "To be occupied within sixty days as hotel by tenant." On the back of the application was a statement in writing as follow: "Party leaves in a few days for the East to buy furniture and fit up the hotel in business style." (Sgd.) "David Wright." To the question, "Suppose the application had said the building was to be vacant," witness replied that the risk would not have been taken.

T. B. Mills, the sub-agent of the defendant companies, at Las Vegas, N. M., testified, among other things (printed record, 140, pp. 40, 41), that he knew David Wright through his application for insurance. In July, 1881, he received an application from David Wright, through T. Park Butcher, for $10,000 insurance on a hotel in Silver City, the value of which was stated to be $15,000. The application was clearly and fully filled out and signed by David Wright. It was written upon a blank of the Fire Association of Philadelphia, and stated that the property was unencumbered in every way and was to be occupied as a hotel within sixty days; and also that at the time the application was made the party was just leaving for the North to buy furniture to fit up the hotel; that it was very valuable and paying property, and there was no fear of incendiarism. Upon this application witness issued the two policies sued on, the application being made a part of each policy. The application was signed by David Wright, and was forwarded by witness to Dargan & Trezerant, Dallas, Texas, together with the monthly report of the witnesses respecting the two policies in question.

John J. Bell and John M. Ginn, attorneys at law and witnesses for the plaintiff, corroborated J. T. Dargan, the witness for defendant, as to loss of valise, application papers, &c. (See printed record, No. 140, pp. 21, 27.

David Wright, the plaintiff, recalled, testified that he made the application for the insurance in the defendant companies; that the property was worth the amount stated therein, $15,000; denied conversation testified to by West as to the insurance company being forced to take the property if Holt & Evans did not, &c.; also, that he did not know that powder or any other combustible material was kept in the hotel, and never gave any one permission to keep it there. It would take all of six months to get the furniture to the hotel. Such things had to be bought in the East and shipped around San Francisco and Shakespeare. Holt & Evans never gave up their contract, and refused to occupy the building until the latter part of July, 1881. It was hard to lease it then.

At this point the plaintiff rested, the testimony was announced finished and the case closed. The trial had lasted several days, and the court adjourned over to nine o'clock A. M. on Monday.

The evidence, fairly weighed, showed that the building had cost from $8,000 to $13,000; that it was worth at the time of the fire from $5,000 to $8,000, on account of cheapening of material, and that there was a salvage from the fire of about $1,000.

On the reconvening of the court on the following Monday, the plaintiff proposed to go upon the stand again to testify with regard to the form of the application. To this the defendants objected. The court overruled the objection, and defendants then and there excepted. Upon this exception the defendants base their first assignment of error.

David Wright, the plaintiff, over the objection aforesaid, was permitted to testify (see printed record, No. 140, p. 42), that, to the best of his recollection, the application in question contained no statement at all with reference to the occupancy of the hotel, only that it was to be used as a hotel. To the best of witness' recollection the statement in that respect in the application read as it reads in the policy. It didn't state anything as to the occupancy, only that it was to be used as a hotel.

On cross-examination, witness had no recollection of language in the application to the effect that the building was to be used as a hotel within sixty days, and, to the best of his memory, he would say it was not true that it did so state.

On re-direct, plaintiff stated that he had first made known the fact of his recollection about the application since the adjournment of court on Saturday and between four and five o'clock on Monday morning, at the train.

Here the plaintiff again rested, and the testimony was again announced closed.

After argument, and before the case was given to the jury, the court was asked by the defendants to give the following instructions to the jury:

First. "That, in view of the provision of the policy that the building was to be occupied as a hotel, the law implies the contract to be that it should be occupied within a reasonable time thereafter, and the fact, sworn to by the plaintiff, that between the 11th day of July, the date of the policy, and the 19th day of January, the date of the burning, the building had not been, and was not at the date of the burning, occupied as a hotel, constituted such a delay in the time of occupancy as was unreasonable, and such as in law avoids the policy, and the verdict of the jury upon that ground should be for the defendant."

See printed record, No. 140, p. 43.

This instruction the court refused to give; to which refusal the defendants then and there excepted, and this constitutes the basis of the second assignment of error.

Second. The defendants further insisted as a matter of law, the Court should instruct the jury upon the facts of the case, that the verdicts should be for the defendants.

This instruction the Court refused to give, and defendants then and there excepted.

This exception constitutes the basis of the third assignment of error. (See printed record, No. 140, p. 43.)

The Court thereupon instructed the jury as follows:

First. "Perhaps the most important point in the case is the use of this building as a hotel. The policy provides that the application of the plaintiff for insurance shall be considered a part of the policy. The application has been lost and cannot be produced. The defendant, the insurance company, contends that the application provided that the building should be occupied as a hotel in sixty days. The plaintiff insists that there was no such limit. The jury are to decide from the evidence that has been heard on the subject what the provisions in the application are. If you should come to the conclusion from all the evidence applicable to the subject that it contained a provision that the building should be used for a hotel in sixty days, then the plaintiff would not be entitled to recover, because, when the building was burned, it was not operated as a hotel. This is all I am inclined to say on that question." (See printed record, 140, p. 43.)

To this charge the defendant then and there excepted, upon the ground that it failed to instruct the jury, that upon the evidence as to the sixty days' limit in the application, the law would require them to find verdicts for the defendants. This exception constitutes the basis of the fourth assignment of error.

The court further instructed the jury as follows:

Second. "As to reasonable time, I will say to the jury that if there was no statement in the application as to the time in which the building was to be used as a hotel, in that case it was the duty of the plaintiff to operate it as a hotel, or have it used as a hotel, in a reasonable time, and the question of reasonable time is for you to determine."

To this charge the defendant then and there excepted, because it did not instruct the jury that upon the evidence as to the failure of the plaintiff to cause the property to be occupied "for hotel purposes" within a reasonable time, the law required verdicts for defendants. And further, because the Court failed to define what was

meant by reasonable time, or to lay down rules by which the jury might intelligently reach a conclusion on that subject. This exception constitutes the basis of the fifth assignment of error.

The court further instructed the jury as follows:

Third. "I believe there is a provision in the policy that no powder or combustible material be placed in the building while insured. If the jury should believe from the evidence that the plaintiff, Wright, or his authorized agent, authorized powder or other combustible material to be placed in the building, that would vitiate the policy and render it void."

To this charge the defendant then and there excepted, because it confined the avoidance of the policy to the placing of powder or other combustible material in the building by the authority of plaintiff Wright or his authorized agent.

This exception constitutes the basis of the sixth assignment of error.

The errors assigned by defendants, upon the exceptions aforesaid, are as follows:

First. That the court erred in permitting the evidence to be reopened for the reintroduction of the plaintiff as a witness after it had been finally closed on Saturday evening.

Second. That the court erred in refusing to charge the jury that they should return verdicts for defendants, as set forth in the first request of defendants.

Third. That the court erred in refusing to charge the jury that they should return verdicts for defendants, as set forth in the second request of defendants.

Fourth. That the court erred in charging the jury as set fourth in the first paragraph of his charge.

Fifth. That the court erred in charging the jury, as set forth in the second paragraph of his charge.

Sixth. That the court erred in charging the jury as set forth in the third paragraph of his charge.

First. The matter of reopening the testimony was in the discretion of the court, but I submit that it was not wisely exercised under the facts of this case.

Second, Third, Fourth, and Fifth. As to the refusal of the first request to charge, and the charge as given in the first and second paragraphs:

Where the policy of insurance sued on describes the property covered as a "two story adobe and wood-stuccoed shingle-roof hotel building, to be occupied for hotel purposes," and contains conditions (see printed record, No. 139, p. 5, and No. 140, p. 6), that the policy shall become void, "if the building becomes unoccupied without the assent of this company endorsed thereon" or "if it shall become vacant or unoccupied for the purpose indicated in the contract for a period of more than five days," and the evidence for the plaintiff discloses that the building never was occupied for hotel purposes, and more than six months after the date of the policy two negroes only slept therein, the name of one being unknown, and gunpowder, giant powder, and blasting powder was there kept, can it be possible that it was the duty of the court to leave the question to the jury whether the building was operated as a hotel *within a reasonable time.*

See May on Insurance, §§ 247, 248, 249.
See Wood on Insurance, §§183, 184.

"Although there may be some evidence in favor of a party, yet, if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the Court is not bound to submit the case to the jury, but may direct them what verdict to render."

Herbert *vs.* Butler, 97th U. S., 319, 320.
Anderson Co. Commissioners *vs.* Beal, 113th U. S., 241.
Railroad Co. *vs.* Commercial Bank, 123d U. S., 733.

In the cases before the Court, the witness, J. T. Dargan, swore unqualifiedly to the fact that the application stated that the building was to be occupied within sixty days for hotel purposes, and that the tenant was about to leave in a few days for the East to buy furniture, &c. (See printed record, No. 140, p. 38.)

To the same effect, and with the same certainty, swore T. B. Mills. (See printed record, No. 140, p. 40.)

This evidence was uncontradicted except "to the best of the recollection" of plaintiff, when the testimony was reopened.

As to storing of gun powder, &c.

See Wood on Ins., §63.

Conditions and stipulations made part of policies constitute warranties, and if not true, or not complied with, invalidate policy whether material to the risk or not.

May, § 156.
Wood on Ins., §58.
Porter's Laws of Ins., 139 et seq.
Insurance Company *vs.* Slaughter, 12 Wal., 404.

But the decision in case of Insurance Company *vs.* Gunther, 116 U. S., 128 et seq., is absolutely conclusive of this question. This Court says:

"The Circuit Court charged the jury, in substance, that it was not a breach of the conditions of the policy, if they should find that a half barrel of benzine was stored by direction of Walker in the oil room, unless they should also find that he acted by the express or implied authority of the assured; that is, unless in doing so he was acting in the management of the property as the agent of his wife, and within the limits of the authority conferred upon him for the purpose of managing the property according to the terms and purposes of her tenancy, and accordingly the jury was told that if he had brought the prohibited article on the premises, not for the legitimate use of the hotel, but for an outside purpose, it constituted no defense. The outside purpose referred to was suggested by some testimony, that the benzine was brought for the purpose of being used in lighting an adjacent grove for a picnic. Whether this use was for the entertainment of the guests of the hotel, or to attract custom, does not appear from the evidence; but, in any view, we think the construction of the policy, on which the charge to the jury was based, was erroneous.

"One of the conditions of the policy is, that if the assured shall keep or use any of the prohibited articles without written permission, it shall be void; another is, that the articles named are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on the policy.

"A violation of these prohibitions by any one permitted by the assured to occupy the premises is a violation by the assured himself. * * * Walker was in no sense a stranger or a trespasser. With his wife he was in the lawful occupation of the premises, and, with the implied assent of the assured, at least was entrusted with the control and management of them," &c. (See authorities cited.)

"The question whether a warranty has been broken can never depend upon the knowledge, or ignorance, or intent of the party making it touching the acts or the fact constituting the breach."

Matson *vs.* Insurance Company, 73 N. Y., 310, cited in Insurance Company *vs.* Gunther, 116 U. S., 129.

"Neither is it material that the landlord did not know that his tenant kept gunpowder. His contract with the insurance company was that it should not be kept without permission, and it was his business to see that his tenants did not violate the contract in this respect."

Insurance Co. *vs.* Williamson, 26 Penn. St., 196, 198.

Evidence to show that this prohibited use did not increase the risk and did not cause the fire inadmissible.

Diehl *vs.* Insurance Company, 58 Penn. St., 443, 449, 450, 451.

Howell *vs.* Balt. Eq. Society, 16 Md., 377.

To the same effect the authorities could be multiplied indefinitely.

Respectfully submitted.

HENRY JACKSON,
Of Counsel for Plaintiffs in Error.

Supreme Court of U.S.
FILED
DEC 13 1888
JAMES H. McKENNEY.

NO. 139.

IN

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1888.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs
DAVID WRIGHT,
Defendant in Error.

Error to the United States Circuit Court for the Southern District of Illinois.

Brief of Defendant in Error.

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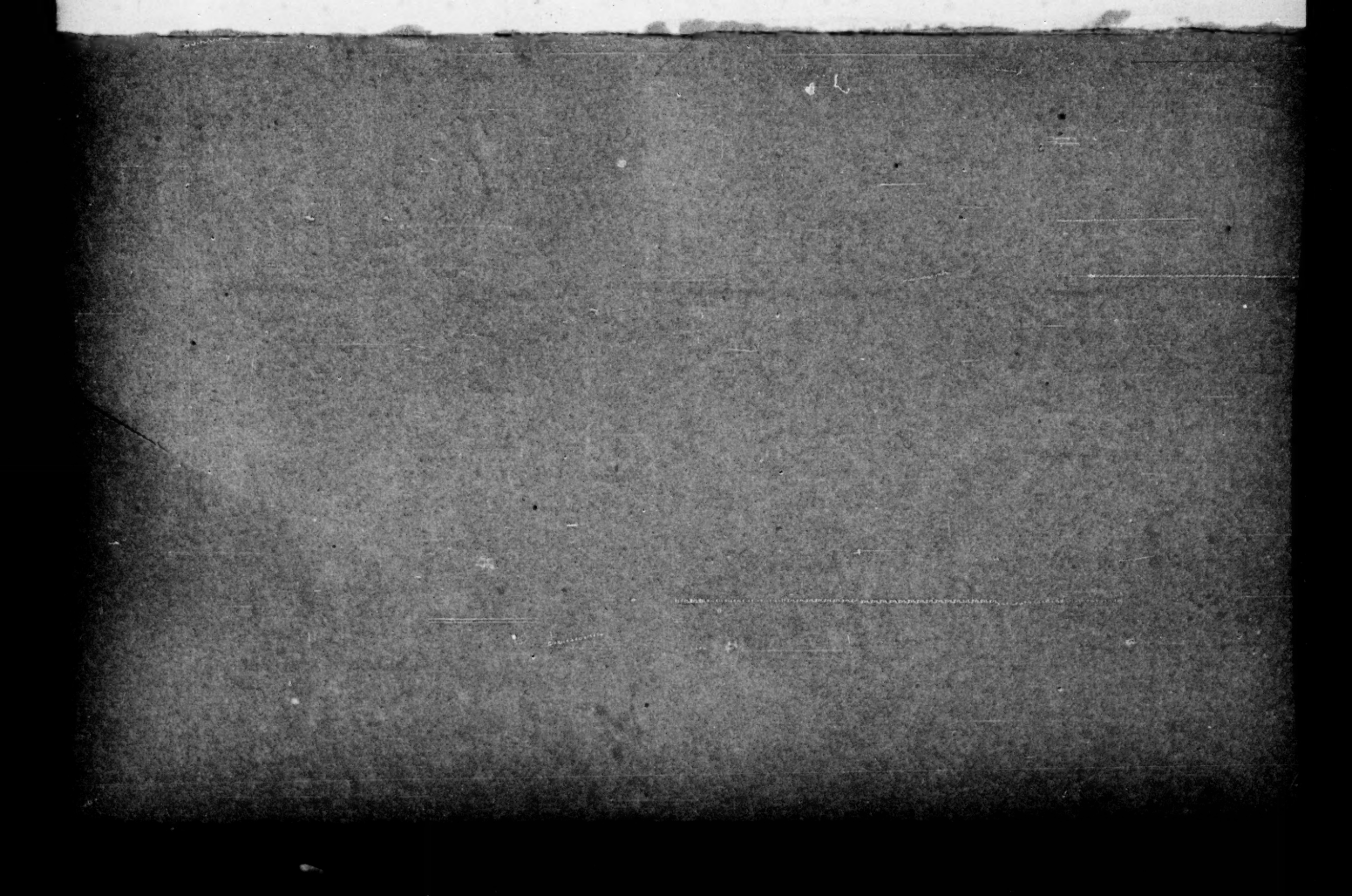

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Brief for Defendant in Error.

STATEMENT.

This action was brought by the defendant in error to recover upon a policy of insurance issued by plaintiff in error, and dated the 11th day of July, A. D., 1881, to insure the defendant in error for one year against loss by fire to the amount of five thousand dollars upon a building described in the policy as follows: "*His two-story adobe and wood structure, shingle roof hotel building "to be occupied for hotel purposes, and situated in block 144, "bounded by Bennett, Sixth, Hudson and Seventh streets, Silver City, "Grant County, New Mexico,*" for damage sustained by the destruction of said building by fire, which occurred on the 19th day of January, A. D., 1882.

The action was commenced on the first day of July, A. D., 1882, in the Circuit Court of Green County, Illinois, and was thence removed to the United States Circuit Court for the Southern District of Illinois. It was tried at the January Term, A. D., 1885, of that court before Hon. S. H. Treat, judge, and a jury, and resulted in a verdict in favor of plaintiff below, for five thousand seven hundred and fifty dollars.

A motion for a new trial by plaintiff in error was denied, and judgment was entered on the 9th day of May, A. D., 1885, in favor of defendant in error for the amount of the verdict and costs. A bill of exceptions was tendered and allowed, and a bond approved and filed on the 7th day of July, A. D., 1885.

The pleadings consisted of a special count on the policy, and an indebitatus assumpsit count, on the part of the plaintiff below, and on the part of the defendant below, of the general issue with a stipulation to allow defendant below to introduce any evidence which might be introduced under notice of special defenses. [Record 50, 48.]

The policy on which the action was brought contained the following provisions, material to be considered on this hearing, namely:

1 That the application for insurance, including the survey, plan and description of the property, should be considered a warranty.

2 That the building insured was "*to be occupied for hotel purposes.*"

3 That if the building should at any time be occupied or used so as to increase the risk, or if the risk should be increased by any means whatever, within the control of the assured, the policy would be void.

4 That if the building should become unoccupied without the assent of the company indorsed upon the policy, it would become void.

5 That if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in the policy, and if the interest of the assured be other than an entire unconditional and sole ownership for the use and benefit of the assured and be not so represented to the company and so expressed in the written part of the policy, it would be void.

6 That "if on said premises there be kept gunpowder, fire works, &c., * * without written permission," the policy would be void.

7 That "persons sustaining loss or damage by fire should forthwith give written notice of said loss to the company, and as soon thereafter as possible render a particular account, signed and sworn to by them," &c., giving particulars as set out in the policy.

The policy also provided that in case of loss each party should pay one-half of the adjuster's expenses, from the home office to Silver City. (Record, 49–54.)

The evidence tended to show the destruction of the building by fire on the 19th day of January, A. D., 1882; that very shortly after the fire one J. L. Dargan, plaintiff in errors adjuster came to Silver City to investigate the fire; that defendant in error was absent at the time of the fire, and as soon as he heard of it wrote to *Bell & Wright*, attorneys at Silver City, requesting them to attend to the adjustment of the insurance; that they, acting for him, met Mr. Dargan, answered all questions and furnished him every facility for ascertaining all the facts; that they at Dargan's

request employed an engineer to draw a ground plan of the hotel according to a description given by the builders, and delivered the drawings as directed by Dargan to one Robert Black, a contractor and builder; (Record, 65–66.) that in all this the agents of plaintiff below regarded Dargan as the adjuster for the company; that he collected all the information about the fire that he required; that not hearing from the company after Dargan left, Bell & Wright wrote the company stating what they had done, and asking whether anything more was needed; that the company replied recommending them to correspond with Dargan; that they did so correspond; that Dargan wrote stating that no proofs of loss had been received and requested them to forward proofs of loss at the earliest convenience, as it was impossible to do anything in the matter until such were received, and also stated, *that notice of the loss had been forwarded to the company as soon as it occurred;* that to this it was replied by defendant in errors attorneys, that Mr. Dargan had had his own way while at Silver City in adjusting the whole matter; that it had been supposed that he had secured all proofs of loss himself; that Mr. Dargan had been considered as the agent of both parties, in as much as his expenses were to be borne by both parties mutually; that sworn statements with full proofs of loss had been submitted to Dargan while he was acting as adjuster; that upon receiving Dargan's letter requesting proofs loss, formal proofs of loss signed and sworn to by defendant in error, were prepared according to the requirements of the policy, and accompanied with a magistrate's certificate were forwarded to the company. (Record 65–71.)

To these proofs of loss, it does not appear from the record that any objections were ever made.

There was also evidence tending to show that the building was constructed for hotel purposes, and was but just completed when the policy was issued, and had not been occupied for any purpose excepting that one *Lusigman* and one *Thornton* had been permitted to occupy one room for the purpose of looking after the premises (Record 61, 62); that in that way and in that way only the building was occupied at the time of the fire.

The evidence also tended to show, that the defendant in error at the time the policy was issued had a contract with *Holt & Evans* for leasing the building for hotel purposes (Record 97):—that after the policy was issued they refused to carry out the contract by which the hotel was left on defendant in error's hands the latter part of July 1881 at a time when it was difficult to procure tenants for such a building;—that in order to run the hotel it was necessary to procure furniture and supplies from the East which had to be shipped around by the way of San Francisco and Shakespeare; and that it would take all of six months to get furniture to the hotel. (Record 106.)

There was some evidence tending to show that Lusigman

took some powder into his room—but whether it was there at the time of the fire is not sufficiently clear to make it obligatory on the jury to accept it as a proved fact in the case. (Record 56, 57.)

There was also evidence tending to show that defendant in error did not know that any powder or combustible matter had ever been taken into the hotel; and that none was ever taken into the hotel by the defendant in error or any authorized agent of his. (Record 114,115 and 61.)

There is no assignment of errors on the record. The contention by plaintiff in error below, however, was:

1 That Mr. Wright was not absolute owner of the property, and that on that account the policy was void.

2 That the written application for insurance contained a provision that the building was to be occupied for hotel purposes within 60 days and that the non-occupancy rendered the policy void.

3 That if there was no limitation of time for occupying the premises, then it was incumbent on defendant in error to have devoted the building to hotel uses *within a reasonable time* and that this was a question of law for the court.

On the first question there was evidence tending to show that Wright was absolute owner, (Record 94, 95, 115.)

On the second question, the application having been lost, there was parol evidence as to what the application contained which tended to show that the application corresponded with the policy; that the only statement made at the time the insurance was procured, in regard to occupancy was, that the building "was to be used as a hotel"; that it was not stated and did not appear in the application that the building was to be used as a hotel within 60 days. (Record 116.)

INSTRUCTIONS REFUSED.

The following instructions requested by plaintiff in error were refused by the court, namely:

1 "That in view of the provisions of the policy that the "building was to be occupied as a hotel the law implies the "contract to be that it should be occupied within a reasonable time "thereafter, and the fact sworn to by plaintiff that between the "11th day of July, the date of the policy, and the 19th day of "January, the date of the burning, the building had not been and "was not at the time of the burning, occupied as a hotel consti- "tuted such a delay as in law avoids the policy, and the verdict of "the jury upon that ground should be for the defendant."

2 The plaintiff in error also asked the court to charge the jury "as matter of law that upon the facts of the case the "verdict should be for the defendant." (Record 117–119.)

INSTRUCTIONS GIVEN.

By the Court. "Perhaps the most important point in this "case is the use of the building as a hotel. The policy provides "that the application for insurance shall be considered a part of the "policy. The application is lost and cannot be produced. The "defendant, the insurance company, contends that the application "provided that the building should be occupied as a hotel in 60 "days. The plaintiff insists that there was no such limit. The "jury are to decide from the evidence that has been heard on the "subject what the provisions in the application are. If you should "come to the conclusion from all the evidence applicable to the "subject that it contained a provision that the building should be "used as a hotel within 60 days; then the plaintiff would not be "entitled to recover, because when the building was burned it was "not operated as a hotel.—This is all I am inclined to say on that "subject.

"There is a question made about the title of the property. "The evidence shows the legal title was in the plaintiff from the "other gentlemen—owners with him. That is enough unless you "believe from the evidence that he holds that title for the benefit "of Roodhouse and Edwards. If he does, then he would not be "entitled to recover, for the policy provides that he must be full and "absolute owner of the property in order to recover the insurance.

"As to reasonable time I will say to the jury, that if there "was no statement in the application as to the time in which the "building was to be used as a hotel, in that case it was the duty of "the plaintiff to operate it as a hotel or have it used as a hotel, in "a reasonable time, and the question of reasonable time is for you "to determine.

"I believe there is a provision in the policy that no powder "or combustible material be placed in the building while insured. "If the jury should believe from the evidence that the plaintiff "Wright or his authorized agent authorized powder or other com-"bustible material to be placed in the building, that would vitiate "the policy and render it void."

Upon these instructions and the refusal to give the instructions as requested, the questions involved in the case arise.

POINTS.

I.

It may be assumed that the language of the policy and of the application agreed, and was simply that the building was "to be occupied for hotel purposes", the evidence being conflicting as to whether a limitation of 60 days was in the application (the application having been lost). The jury under the instruction of the

court must have found that no limitation was put in the application and that finding is conclusive.

Greggs v. Moss, 14 Wall 564.
Express Co. v. Ware, 20 id. 543.
Mills v. Smith, 8 Wall 27.
Woodruff v. Hough, 91 U. S. 596.
(Record 116–118.)

II.

The language of the policy and the application is then to be assumed to be as follows: "In consideration, &c., * * * "the Continental Ins. Co. do insure David Wright against "loss, &c., * * on his two-story adobe and wood stuccoed "shingle roof hotel building to be occupied for hotel purposes and "situated", &c., and this does not import a warranty, but is rather a representation of an expectation of future condition. Such a representation would not affect the policy unless fraudulently made.

Kimball v. Aetna Ins. Co., 9 Allen 540.
Herrick v. Union Mut. F. I. Co., 48 Me. 558.
Catlin v. Springfield Ins. Co., 1 Sumner 434.
Dolivèr v. St. Joseph's F. M. I. Co., 131 Mass. 39.
National Bank v. Ins. Co., 95 U. S. 673.
Rice v. N. E. M. Ins. Co., 4 Pick 439.
Dennistoun v. Lillie, 3 Blighs 202.
Hough v. City F. Ins. Co., 29 Ct. 10.

III.

If the language of the policy imports a warranty, it is a "promissory warranty" and the assured had a *reasonable time* in which to comply with its requirements. (Cady v. Imperial Ins. Co., 4 Clifford 203. James v. Lycoming Ins. Co., id. 272.) And this question of reasonable time turned upon the circumstances of the case, some of which were disputed (Record 115 and 98) and the court ruled correctly in submitting the question to the jury. That where there are qualifying circumstances or disputed questions of fact the question of reasonable time is one for the jury, seems to be well settled to be the rule in insurance cases.

Gloucester Mnfg. Co. vs. Howard Fire Ins. Co., 5 Gray 497.
West Branch Ins. Co. v. Halfenstein, 40 Pa. St. 289.
Continental Ins. Co. v. Lippold, 3 Neb. 391.
Ward v. Law Property Assurance Co., 4 W. R. 605.
German Ins. Co. v. Curran, 8 Kans. 9.
Edwards v. Baltimore Ins. Co., 3 Gill. 176.
Providence Life Ins. Co. v. Martin, 32 Md. 310.
Davis v. Western Mass. Ins. Co., 8 R. I. 277.

Lindsay, Jordan & Co. v. Union Mut. I. Co., 3 R. I. 157.
Palmer v. St. Paul F. & M. Ins. Co., 44 Wis. 201.
Ben Franklin Ins. Co. v. Flynn, 98 Pa. St. 627.
Murdock v. Chenango Co. Mut. Ins. Co., 2 Comstock 200.

The same principle also holds good in other cases where circumstances exist which affect the question.

Howe v. Huntington, 15 Me. 350.
Holbrook v. Burt, 22 Pick 46.
Magee v. McCormic, 13 Ill. 289.
Union N. B. of Ch. v. Baldenwic, 45 Ill. 375.
Haywood v. Harmon, 17 Ill. 477.
Kennedy v. Gibbs, 15 Ill. 406.
Scott v. Buchanan, 11 Humph. 468.
Union Bank v. Ezell, 10 Humph. 385.
Porter v. Patterson, 15. Pa. St. 232.
Goodwyn v. Chevely, 4 Hurlst and North 640 (Bramwell dissenting).
Fry v. Hill, 7 Taunt. 377.
Facey v. Hividom, 3 B. & C. 213.
Burton v. Griffiths, 11 M. & W. 817.
Conger v. Hudson, R. R. R. Co., 6 Duer. 375.
Green v. Haines, 1 Hilton 254.

IV.

Notice of loss and proofs of loss were submitted within a reasonable time, and the delay in transmitting proofs of loss, was excused so that the whole matter was for the jury. (See Record 67 and 65–71.)

Swan v. Liverpool, London & Globe Ins. Co. 52 Miss. 704.
Palmer v. St. Paul Ins. Co., 44 Wis. 201.
Ben Franklin Ins. Co. v. Flynn 98 Pa. St. 627.
Edgerly v. Farmers Ins. Co. 48 Iowa, 644.
Butterworth v. Western Assurance Co., 132 Mass. 489.
Aetna Ins, Co., v. Schnue 85 Ind. 366.
Blake v. Exchange Mut. Ins. Co. 12 Gray, 264.
Franklyn Ins. Co. v. Chicago Ins. Co. 36 Md. 102.

V.

The evidence tended to show that no gunpowder or other combustible material was ever placed on the premises by authority, or with the knowledge of, defendant in error or any agent of his. This was a question for the jury, and was properly left to them by the court.

VI.

Whether powder was in fact in the building at the time of the fire, was also a question of fact for the jury. The evidence on that subject was not of sufficient force to make it a necessary inference, from the evidence that powder was *kept* on the premises by any one, and the finding of the jury is conclusive.

ARGUMENT.

I.

That we are correct in assuming that the phraseology of the application and of the policy in regard to the intended occupancy of the premises was in substance the same, and that no limit of time was provided, within which the insured building should be occupied for hotel purposes, will appear from a very slight inspection of the record.

1 It will be seen that the policy itself contained no limitation. (Record 49.)

2 The application was lost, and plaintiff below testified that there was no representation as to time, and that the application and the policy were the same; the application "contained no statement at all with reference to the occu- "pancy of the hotel, only that it was to be used as a hotel." (Record 116.)

3 It appeared in evidence, that the hotel was just completed when the policy issued; that it was unfurnished and unoccupied, and that it would take six months to procure the furniture and supplies necessary to start, and hence the claim by plaintiffs in error, that it was to be occupied in 60 days for hotel purposes was improbable.

It is true the plaintiff in error had the testimony of two witnesses, namely J. L. Dargan, agent of plaintiff in error, who testified to the loss of the application, and that it contained the following question.

"Are the premises entirely under the control of occu- "pant and for what purpose? If not, give full particulars "as to its occupancy and control."—and that it was answered as follows: "To be occupied within 60 days as "a hotel by the tenant."

T. B. Mills, an agent of the company, who testified that the application contained a provision that the building was to be occupied as a hotel within 60 days.

Here then was a conflict. It is no matter where the weight of the testimony was on this question. It is not an open question whether this Court will look into the evidence to see whether the jury has made a mistake.

Gregg v. Moss, 14 Wal. 564, Express Co. v. Ware, 20 Id. 543, Mills v. Smith, 8 Wall. 27, Woodruff v. Hough, 91 U. S. 596, are cited from among numerous cases, showing the extent to which this court has gone in its scrupulous regard for the province of the jury.

II.

Assuming then that the policy contains the only stipulation between the parties in relation to occupancy, to wit: that the insured building was "to be occupied for hotel purposes" and that there was nothing further on that subject, we submit that it is a fair construction that the parties could have only intended this as a reservation for the benefit of the assured or a representation only of expectation as to future condition.

It is well settled that policies, drawn as they are, by the insurance companies are to be construed favorably to the assured. In National Bank v. Ins. Co., 95 U. S. 673, wherein was a policy containing nearly the same stipulations about representations being warranties, &c., in view of the amplitude of language in the policy not only with reference to warranty, but with reference to false representations, fraud, &c., vitiating the policy—it was considered uncertain as to what the intention was as to imposing a warranty and that when a policy is so framed the construction which imposes a warranty will not be favored.

It can not be fairly argued that the parties certainly intended this as a warranty that this building should be occupied for hotel purposes.

When the policy was written, the building was unoccupied excepting by two persons who kept watch over the hotel. Can it be said in the absence of testimony, that there would be less risk to the building while occupied as a hotel than while under the special care of two men? On the other hand, it might well be considered as a proper precaution on the part of the assured, to reserve to himself the right to have the building occupied for hotel purposes, a risk generally considered as hazardous. If this was not in the minds of the parties, what is more reasonable than that the whole intention was to represent what the *expectation* of the assured was? It does not seem to be clear upon the face of the policy and under the circumstances of the case, that there was an intention to enter into contract to occupy this building for hotel purposes.

The view that the language used only imports a reservation or a representation of an expectation, is supported by a similar view taken in some well considered cases.

In *Hough vs. City Fire Ins. Co., 29 Conn. 10*, the survey embraced in the application contained the following interrogatory and answer:

"How are the several stories occcupied?" Answer: "Unoccupied, *but to be occupied by a tenant.*" The policy contained the usual stipulation about the representations in the application being deemed a part of the policy, and a warranty on the part of the assured. It was held that the answer was not to be considered as a stipulation that the house should be occupied by a tenant, but rather *as a reservation on the part of the applicant, of the right to have it so occupied, and to avoid the inference that it was to remain unoccupied. In Dollivir et al, v. St. Joseph F. I. Co., 131 Mass. 39*, the policy contained this statement, "*Used for the storage of ice.*" When the policy was issued there was no ice in the building, and the language used was, in view of that fact, the same as if it had read, "*to be used for the storage of ice.*" It was held not a warranty but as description. Necessarily it referred to an intention to use the building for the same purposes that it had been used for.

In *Herrick v. Union Mutual Ins. Co., 48 Me. 558*, the application contained the the following question and answer:

"Who owns and occupies the building?"—Answer: "Owned "by applicant; *to be occupied by a tenant.*"

This was held to be a representation of *an expectation*, and not a warranty, citing *Rice v. N. E. M. Ins. Co., 4 Pick. 439*, which was a case where the master of a vessel writing for insurance to the agent stated that *the vessel would sail on the 12th*, and the agent so represented. It was held that this was a mere *expectation*. In Denistoun v. Little, 3 Bligh supra the language of the letter requesting insurance was as follows: "The *Brilliante* will sail on "the 15th of May—a receiving vessel—in which the writer of this "will take passage." The *Brilliante* had in fact sailed. It being in time of war, the fact of the vessel having already sailed was held material. The Lord Chancellor said he considered this as going beyond an *expectation*—recognizing the view that had it related only to the future movements of the vessel, it would have been considered a representation of expectation merely. In *Catlin v. Springfield F. I. Co., 1 Sumner 434*, a case often cited and always with approval, the language in the policy was as follows:—"*at present occupied by one Joel Rodgers as a dwelling house but to "be occupied hereafter as a tavern and privileged as such*", and it was held not to be a warranty, but a reservation. Other cases with more or less bearing upon this question might be cited but we believe that the foregoing authorities fairly sustain and are sufficient to justify our position.

III.

If this is to be construed as a warranty, then it seems to be clear that it is to be construed as a *promissory* warranty—a distinction well taken and elaborately argued in *Cady v. Imperial Ins.*

Co., 4 Clifford 203 and in *James v. Lycoming Ins. Co., idem 272.*

That in this view the assured would have "*a reasonable time*" in which to occupy or to procure the occupancy of the insured building for hotel purposes, is not denied. That the question of reasonable time in a case like this is for the jury, appears to be clear both upon reason and authority.

Reasonable time in this case depended on many circumstances; the time when the parties who were under contract to occupy it, first refused to carry out their agreement; the season of the year; the difficulty in procuring tenants; the difficulty in procuring furniture; and the time it would take to procure it —were circumstances that actually entered into the question, and must have been within the minds of the parties, if this was in fact a stipulation to put the building to hotel uses. The rule that the court, for the sake of certainty, will, wherever there has been a mere lapse of time, treat the question as one of law, does not apply, and we believe never has been applied to a case like the one at bar.

Lord Mansfield in *Tyndal v. Brown, 1 Term R. 16*, said: "Whenever a rule can be laid down in respect to reasonableness, it should be decided by the court, and adhered to by every one for the sake of certainty."

It needs no argument to show that a rule can not be laid down to cover such cases as this case. The authorities do not sustain the view that where there is no conflict in the evidence, the question becomes one for the court if the circumstances are of such a character that a certain rule can not be applied. This question was ably discussed by Judge Shippen in *Howe v. Huntington, 15 Me. 350.* The question arose in a case of contract, where each party was to do certain acts upon the happening of a certain event, and no time was fixed. Reviewing the authorities, that learned jurist found the rule to be, that in giving notices in regard to negotiable paper, in regard to tenants, and in many cases of a general nature and prevailing usage, the judges will decide; but "where "there is no certain time limited within which or from which a "thing is to be done, but is to be accommodated in some degree to "the interests of the party and the course of trade, as in the case of "bills *at sight* or notes on *demand*, or where it may in some man-"ner depend on the state of the weather, as in the case of removal "of goods distrained, or the tithing of a crop, it has been left to "the jury to decide upon each case as it arises."

Thus in case of life tenancy, the reasonable time in which to remove goods after termination of tenancy, has been held to be a question of law.

(Stoden v. Harvey, Cro. Jac. 204.,Co. on Lit. 566.)

So of notice to quit, to tenant at will, (Ellis v. Paige, 1 Pick 43.) While in cases of bills payable, or after sight, or on demand the

holder has a reasonable time in which to present for payment which is a jury question. (Field v. Nickerson, 13 Mass. 13.) So also a tithe owner has a reasonable time to compare the tithe set out with the other nine tenths, which is a jury question. *Jacey v. Hardin, 3 B. & C., 213.* So also a landlord has a reasonable time to remove distrained goods. (Pitt v. Shaw, 4 B. & Ad. 206.) Abbott C. J. in Smith v. Doe, 2 B. & C. 270, puts the rule as Lord Mansfield has stated where it can be applied with certainty in cases of prevailing usage, but in cases "*which may depend on particular* "*facts and circumstances (he says) the assistance of a jury may be* "*required.*"

Starkey says: "Where the law does not by the operation of "any principle or established rule decide upon the legal quality of the "simple facts, it is for the jury to draw the general inference of rea- "sonable or unreasonable. Starkey's Ev., 453.

On the ground that where circumstances affect the measure of reasonableness, it becomes a question of fact for the jury, it was held in *Magee v. McCormic, 13 Ill. 289*, that whether a bill of a broken bank was returned in reasonable time was a question for the jury; in *Union National Bank of Chicago, v. Baldenwic, 45 Ill., 375* that reasonable time to return counterfeit money is a question for the jury, in which the court say it is because it depends "*upon the situation of the facts and circumstances of the particular case;* in *Bell v. Nims, 51 Ill, 171 and Kennedy v. Gibbs, 15 Ill. 406 that* under a statute which allowed interest in cases of "*unreasonable and vexatious delay,*" in *Bank v. Ezell, 10 Hump 385*, the question being one of *reasonable notice* of non-payment, where the bill was indorsed after due; in Scott v. Buchanan, 11 Hump. 468, the question being whether a person, after arriving at his majority, had, within a reasonable time, exercised his right to rescind a contract entered into while he was under age; these questions were held to be for the jury. In the case last cited, the court say: "as to "the time within which a party may exercise this right of election, "*no uniform rule could be established without prejudice to the right itself* "What would be considered as a very reasonable and proper time in "one case, might well be considered as unreasonable and unnecessary "in another, owing to a difference in the condition and situation "of the parties, in reference to the right to be affected by the ac- "tion." In *Porter v. Patterson, 15 Pa. State 232* the court held that whether a consignee had expressed his dissent within a reasonable time to his consignor, who had departed from instructions in a sale of goods, was a question for the jury; citing many cases. Without further citation from the numerous cases in this subject, we think we are warranted in our position that upon principle, the question of reasonabe time in this case was properly left to the jury, it being a case depending on its own peculiar circumstances.

(2dly.) The authorities clearly sustain the view that in cases similar to the one at bar, the question of *reasonable time* has almost uniformly been left to the jury.

In *Hough vs. City Fire Ins. Co., 29 Conn. 10, Supra*, where the application provided that the insured premises were "*to be occupied by a tenant*," the court instructed the jury, that as no time was specified when such occupancy was to commence, "*the warranty* "(*if a warranty*) *would not be broken if such occupancy* "*was procured within* a reasonable time," and this instruction was approved, Judge Sanford saying, "in some cases indeed, the court decides, but those are "cases in which it can be determined by a simple application "of some rule or principle of law, to facts proved or admitted at "the trial; *but where the law is silent and does not by the operation* "*of any principle or established rule decide upon the legal quality* "*of the simple facts it is for the jury to draw the inference of reason-* "*able or unreasonable* in point of fact.

In *West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289*, the policy provided that notice of loss must be given *forthwith* to the secretary of the company. The fire occurred Oct. 4. The defendant in error went to see the agent the same day, but he was not at home and was not seen. The local agent however, was informed of the fire and wrote the secretary on Wednesday next after the fire. The secretary came in a day or two, and defendant in error was, through the local agent by direction of the secretary, told to make out his proofs of loss, and that he would be paid.

The court instructed the jury that it was for them to find whether the notice had been given within a *reasonable time*, and it was held to be a proper instruction. In *Edwards v. Baltimore F. I. Co., 3 Gill. 176*, the question whether notice of loss under a policy having similar provisions, was given in reasonable time was left to the jury and approved. In *Continental Ins. Co. v. Lippold, 3 Neb. 391*, the fire occurred on the 16th of April '71. A few days afterwards defendant in error requested the local agent to notify the company. He informed defendant in error that he had seen the general agent and had a conference with him; on the 15th of July, '71, defendant in error employed one Doerfelt to write to the general agent stating the loss, which was done. On the 16th of August the general agent wrote defendant that there were suspicious circumstances which he ought to explain. On Jany. 1st, '72, formal proofs of loss were given. The question whether notice of loss was given within a reasonable time, was left to the jury and this was held to be no error.

In *Germania Ins. Co., v. Curran, 8 Kans. 9*, the policy contained a provision that notice of loss must be given *forthwith*.

There was no direct evidence of service of notice. The local agent however gave information of the loss within 48 hours. The question whether this information was given within a reasonable time was left to the jury and approved.

In *Providence Life Ins. Co. v. Martin 32 Md. 310*, which was an action on an accident policy, requiring immediate notice, &c., it appeared that the local agent resided in the vicinity of the accident, but was then absent at Berkly Springs where he heard of it. Within less than a week the widow reported to the agent; made affidavit on the 18th of August, another on the 28th and another on the 4th of September, which were forwarded when made—and the question of reasonableness of the notice was left to the jury. It was held that the question was properly submitted, citing *Edwards v. The Buttman Fire Ins. Co. 3 Gill 176 (supra.)*

In Davis, Hacket & Co. v. Western Mass. Ins. Co. 8 R. I. 276, the action was in a fire insurance policy. The goods were injured by fire April 22, '62. Proofs of loss were given May 31, '62. No reply was made by the company, until the 19th of June when the proofs were objected to.

It was left to the jury to say whether *this reply* was within reasonable time which was approved. The rule laid down by Lord Mansfield was stated, but the court says "there are numerous cases "depending on particular facts and circumstances, in which the "court can not dispense with the aid of a jury", citing *Howe v. Huntington, 15 Me. 350 supra.*

The case of *Lindsly, Jordan & Co. v. Union Mutual Ins. Co., 3 R. I. 157*, is directly in point. In the application the description as to situation and surroundings of the insured building referred to two small adjacent buildings and provided that "both of the above buildings are to be moved 15 feet." A loss occurred before the buildings were moved. The question whether reasonable time had elapsed in which to move the buildings was left to the jury—and the court on review held the submission to the jury proper, saying: "The question of reasonable time is always a question of "fact excepting in those cases in which the law has established "what is to be considered reasonable time. In a case like this "to wit the reasonable time required to remove two buildings no "such reasonable time is, or can be established by law. The nature "of the case involves an inquiry as to facts, and *reasonable infer-"ences as to the state of facts in the case.*

"In cases where the law raises an inference from a state "of facts, the facts being found, the law is to be pronounced by the "court, but in cases where the law raises no such inference *the "reasonable consequence or effect of a state of facts is as much a "matter for the jury to consider as is the existence of the facts them-"selves.*"

In Ben Franklin Ins. Co. v. Flynn 78 Pa. St. 627, the proofs of loss were not furnished until 30 days after the loss.

The policy required that they be furnished as soon as possible, and it was held that the question whether this was within reasonable time, was properly submitted to the jury, citing Ins. Co. v. Davis, idem 280, where three months had elapsed and the question was submitted to the jury.

There are some cases where, there being no dispute about the facts, and no circumstances tending to excuse delay, the question has been treated as one for the court.

Murdock v. The Chemung Co. Mutual Ins. Co. 2 Comst. 210, sometimes cited on this question was decided on the ground that the question of waiver was, upon the evidence improperly submitted, and a new trial was granted on that and other grounds not really involving a question of reasonable time. *Jewett J.* thought if it was involved it was a question for the jury.

The case of *Edwards v Lycoming Insurance Co., 75 Pa. St. 378*, was decided upon the point that the question of a waiver of service of notice of loss was improperly submitted. It did not in any proper sense involve the question under discussion. Without further special reference to this class of authorities we desire to say that upon a careful examination we have found nothing that amounts to conflict of authority upon the question as presented by the evidence in this case.

IV.

No special point was made in the court below, that notice of loss was not served in time; but if this court considers the point saved, by the request that the court charge, as a matter of law, that plaintiff was not entitled to recover, we submit the following considerations;—In the correspondence had with Dargan by direction of plaintiff in error, Dargan states that *he sent notice of loss immediately after the fire*. It is of no consequence whether this was done by direction of defendant in error. The cases cited,(supra), are authority for this view. We call attention especially to the following cases:

Ben Franklin F. I. Co., v. Flynn, 98 Pa. St. 627.
Edwards v. The Baltimore F. Ins. Co., 3 Gill 176.
Providence Life Ins. Co., v. Martin, 32 Md. 310.
Germania Ins. Co. v. Curran, 8 Kans. 9.
Continental Ins. Co. v. Lippold, 3 Neb. 391.
West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289.
(And see other cases cited under our 4th point supra.)

The proofs of loss were delayed under the supposition which was really a fact, that Dargan, who was investigating the fire, had collected and forwarded to the company, at the home office, proofs of loss. The proofs that were afterwards prepared, were prepared and forwarded at the request of Dargan, acting for the company. To have directed a verdict, for defendant below, on this state of

the case, upon the evidence, would have been error. There was at all events something to go to the jury.

V.

The evidence was specific on the part of plaintiff below, that no gunpowder or other combustible material was, to the knowledge of the plaintiff, ever kept in the insured building, (Record 114.); also to the effect that the plaintiff below never gave any one authority to keep gunpowder or other combustible material. *Lusigman* does not state that he had any right to keep powder on the premises, and it would appear that his occupancy was not such as would give him any implied right to do so.

The cases which hold that the policy is rendered void by the keeping of gunpowder without the knowledge of the assured, are cases, where, by leasing, or by mortgaging, the assured had given a legal right to the tenant or mortgagee in possession, to use the premises for purposes forbidden in the policy, so that there was a sort of constructive assent on the part of the assured. It is at all events, pretty clear that where there is no such relation between the assured and any person bringing the forbidden article on to the premises, as to make the assured responsible for the act, or the continuance of the act, the policy would not be rendered void by the mere fact that gunpowder was brought upon the premises,

In Rhode Island it has been held, that a replication that the premises were used for hazardous purposes without the knowledge or assent of the assured, is good.

Hoxie. v. Providence Mut. Ins. Co., 6 R. I. 517.

In every case where a policy has been held to be invalidated by the acts of a tenant or some person representing the assured notwithstanding assured did not know of such use, it will be found that there was a *using* of the premises in a business sense. The language of the policy in this case is, "*if in said premises there be kept* gunpowder." There is not a particle of evidence that gunpowder was "*kept*" in any such sense as must have been within the mind of the parties.

Buchanan v. Exchange Fire Ins. Co. 61 N. Y. 26.

At all events, whether this condition of the policy was broken, was a question of fact for the jury.

It is well settled, that when the conditions of a policy have been broken, by devoting the property to uses prohibited in the policy, the policy does not thereby become a dead instrument, that the uses to which the property was devoted *at the time of the loss* is to determine the questien whether the condition has been broken.

Mutual Fire Ins. Co. v. Coalsville Shoe Factory 80 Pa. St. 375.

The evidence was not such as to make it a necessary inference that gunpowder was *kept* in the premises. *Lusigman* testified-

that while he was at work on the building, he occupied a room where he had his carpenter bench, and that when the hotel was completed he slept in it and kept his tools and baggage there, also that in December 1881 he quit sleeping there, and that at the time of the fire he had removed *one* tool chest, but the balance of his baggage was there. He says while there, (*but does not say when*), that he, without the knowledge of Mr. Wright, took two small cans of Du Pont powder, and a quarter of a can of blasting powder to the hotel; that this powder had been wet, was caked and in lumps; and that he threw out the small cans and put the can (quarter full) of blasting powder in his chest; that he had also some giant powder and a part of a coil of fuse; that he gave this giant powder away except 4 sticks, which he left on a window sill in an adjoining room, and at the time of the fire he had removed one tool chest, (Record 55.) It would seem, therefore, that he had left 4 sticks of powder in a room which he did not pretend to have any right to occupy, and he was a mere trespasser in leaving it there. As to the rest of the powder, it was in his chest and he had removed one chest. There was no evidence of any explosion or sign of powder in that room, and the jury could tell better than we can, whether the powder was in the chest that was removed, or was in the chest that remained. Aside from this there was the testimony of *John M. Ginn* that he saw a powder keg carried out, but that he did *not know whether there was any powder in it*.. (Record 78.)

Chas. A. Newton testified that he was at the fire and found a keg of powder, known as black powder, also a coffee sack containing 8 or 10 sticks of giant powder. This was not the same powder mentioned by Lusigman. At all events the jury were not bound to believe it was the same. The description is not the same. It does not appear where it was found. The evidence of Wright being considered, the jury had a right to believe that this powder was brought onto the premises by some one having no shadow of right to do so. It appears that this building was in a mining country—that powder was in common use—and that it was common to have powder even at hotels.

The jury had a right on this state of facts, to determine whether powder had been "kept at the hotel" contrary to the condition of the policy. They were the judges whether there had been a breach of the covenant in this respect. Boos v. World Lf. Ins. Co., 3 T. & C. 364 (N. Y.). Aurora Fire Ins. Co. v. Eddy, 50 Ill. 106.

We have made no reference in argument to the question of ownership, because it is not disputed that defendant in error had the legal title, and the testimony of defendant in error, being that his ownership was absolute, it will hardly be contended that the question was not for the jury.

Under the established practice of this court, to never review questions which are for the jury, or even to correct a mistake of the jury, we submit there is no error in the record, and that the judgment of the court below ought to be affirmed.

L. H. BISBEE,
JOHN P. AHRENS,
HENRY DECKER.

OF CHICAGO, ILLS.,

Attys. for Deft. in Error.

NO. 140.

IN

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1888.

THE FIRE ASSOCIATION OF PHILADELPHIA,
Plaintiff in Error,
vs
DAVID WRIGHT,
Defendant in Error.

Error to the United States Circuit Court for the Southern District of Illinois.

Brief of Defendant in Error.

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DAVID WRIGHT,
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Error to the United States Circuit Court for the Southern District of Illinois.

Brief for Defendant in Error.

STATEMENT.

This action was brought by the defendant in error to recover upon a policy of insurance issued by plaintiff in error, and dated the 11th day of July, A. D., 1881, to insure the defendant in error for one year against loss by fire to the amount of five thousand dollars upon a building described in the policy as follows: "*His two-story adobe and wood structure, shingle roof hotel building "to be occupied for hotel purposes, and situated in block 144, "bounded by Bennett, Sixth, Hudson and Seventh streets, Silver City, "Grant County, New Mexico,*" for damage sustained by the destruction of said building by fire, which occurred on the 19th day of January, A. D., 1882.

The action was commenced on the first day of July, A. D., 1882, in the Circuit Court of Green County, Illinois, and was thence removed to the United States Circuit Court for the Southern District of Illinois. It was tried at the January Term, A. D., 1885, of that court before Hon. S. H. Treat, judge, and a jury, and resulted in a verdict in favor of plaintiff below, for five thousand seven hundred and fifty dollars.

A motion for a new trial by plaintiff in error was denied, and judgment was entered on the 9th day of May, A. D., 1885, in favor of defendant in error for the amount of the verdict and costs. A bill of exceptions was tendered and allowed, and a bond approved and filed on the 7th day of July, A. D., 1885.

The pleadings consisted of a special count on the policy and an indebitatus assumpsit count, on the part of the plaintiff below, and on the part of the defendant below, of the general issue with a stipulation to allow defendant below to introduce any evidence which might be introduced under notice of special defences. [Record 50, 48.]

The policy on which the action was brought contained the following provisions, material to be considered on this hearing, namely:

1 That the application for insurance, including the survey, plan and description of the property, should be considered a warranty.

2 That the building insured was "*to be occupied for hotel purposes.*"

3 That if the building should at any time be occupied or used so as to increase the risk, or if the risk should be increased by any means whatever, within the control of the assured, the policy would be void.

4 That if the building should become unoccupied without the assent of the company indorsed upon the policy, it would become void.

5 That if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in the policy, and if the interest of the assured be other than an entire unconditional and sole ownership for the use and benefit of the assured and be not so represented to the company and so expressed in the written part of the policy, it would be void.

6 That "if on said premises there be kept gunpowder, fire works, &c., * * without written permission," the policy would be void.

7 That "persons sustaining loss or damage by fire should forthwith give written notice of said loss to the company, and as soon thereafter as possible render a particular account, signed and sworn to by them," &c., giving particulars as set out in the policy.

The policy also provided that in case of loss each party should pay one-half of the adjuster's expenses, from the home office to Silver City. (Record, 49—54.)

The evidence tended to show the destruction of the building by fire on the 19th day of January, A. D., 1882: that very shortly after the fire one J. L. Dargan, plaintiff in errors adjuster came to Silver City to investigate the fire; that defendant in error was absent at the time of the fire, and as soon as he heard of it wrote to *Bell & Wright*, attorneys at Silver City, requesting them to attend to the adjustment of the insurance; that they, acting for him, met Mr. Dargan, answered all questions and furnished him every facility for ascertaining all the facts; that they at Dargan's

request employed an engineer to draw a ground plan of the hotel according to a description given by the builders, and delivered the drawings as directed by Dargan to one Robert Black, a contractor and builder; (Record, 65–66.) that in all this the agents of plaintiff below regarded Dargan as the adjuster for the company; that he collected all the information about the fire that he required; that not hearing from the company after Dargan left, Bell & Wright wrote the company stating what they had done, and asking whether anything more was needed; that the company replied recommending them to correspond with Dargan; that they did so correspond; that Dargan wrote stating that no proofs of loss had been received and requested them to forward proofs of loss at the earliest convenience, as it was impossible to do anything in the matter until such were received, and also stated, *that notice of the loss had been forwarded to the company as soon as it occurred;* that to this it was replied by defendant in errors attorneys, that Mr. Dargan had had his own way while at Silver City in adjusting the whole matter; that it had been supposed that he had secured all proofs of loss himself; that Mr. Dargan had been considered as the agent of both parties, in as much as his expenses were to be borne by both parties mutually; that sworn statements with full proofs of loss had been submitted to Dargan while he was acting as adjuster; that upon receiving Dargan's letter requesting proofs loss, formal proofs of loss signed and sworn to by defendant in error, were prepared according to the requirements of the policy, and accompanied with a magistrate's certificate were forwarded to the company. (Record 65–71.)

To these proofs of loss, it does not appear from the record that any objections were ever made.

There was also evidence tending to show that the building was constructed for hotel purposes, and was but just completed when the policy was issued, and had not been occupied for any purpose excepting that one *Lusigman* and one *Thornton* had been permitted to occupy one room for the purpose of looking after the premises (Record 61, 62); that in that way and in that way only the building was occupied at the time of the fire.

The evidence also tended to show, that the defendant in error at the time the policy was issued had a contract with *Holt & Evans* for leasing the building for hotel purposes (Record 97):—that after the policy was issued they refused to carry out the contract by which the hotel was left on defendant in error's hands the latter part of July 1881 at a time when it was difficult to procure tenants for such a building;—that in order to run the hotel it was necessary to procure furniture and supplies from the East which had to be shipped around by the way of San Francisco and Shakespeare; and that it would take all of six months to get furniture to the hotel. (Record 106.)

There was some evidence tending to show that Lusigman

took some powder into his room—but whether it was there at the time of the fire is not sufficiently clear to make it obligatory on the jury to accept it as a proved fact in the case. (Record 56, 57.)

There was also evidence tending to show that defendant in error did not know that any powder or combustible matter had ever been taken into the hotel; and that none was ever taken into the hotel by the defendant in error or any authorized agent of his. (Record 114,115 and 61.)

There is no assignment of errors on the record. The contention by plaintiff in error below, however, was:

1 That Mr. Wright was not absolute owner of the property, and that on that account the policy was void.

2 That the written application for insurance contained a provision that the building was to be occupied for hotel purposes within 60 days and that the non-occupancy rendered the policy void.

3 That if there was no limitation of time for occupying the premises, then it was incumbent on defendant in error to have devoted the building to hotel uses *within a reasonable time* and that this was a question of law for the court.

On the first question there was evidence tending to show that Wright was absolute owner, (Record 94, 95, 115.)

On the second question, the application having been lost, there was parol evidence as to what the application contained which tended to show that the application corresponded with the policy; that the only statement made at the time the insurance was procured, in regard to occupancy was, that the building "was to be used as a hotel"; that it was not stated and did not appear in the application that the building was to be used as a hotel within 60 days. (Record 116.)

INSTRUCTIONS REFUSED.

The following instructions requested by plaintiff in error were refused by the court, namely:

1 "That in view of the provisions of the policy that the "building was to be occupied as a hotel the law implies the "contract to be that it should be occupied within a reasonable time "thereafter, and the fact sworn to by plaintiff that between the "11th day of July, the date of the policy, and the 19th day of "January, the date of the burning, the building had not been and "was not at the time of the burning, occupied as a hotel consti- "tuted such a delay as in law avoids the policy, and the verdict of "the jury upon that ground should be for the defendant."

2 The plaintiff in error also asked the court to charge the jury "as matter of law that upon the facts of the case the "verdict should be for the defendant." (Record 117-119.)

INSTRUCTIONS GIVEN.

By the Court. "Perhaps the most important point in this "case is the use of the building as a hotel. The policy provides "that the application for insurance shall be considered a part of the "policy. The application is lost and cannot be produced. The "defendant, the insurance company, contends that the application "provided that the building should be occupied as a hotel in 60 "days. The plaintiff insists that there was no such limit. The "jury are to decide from the evidence that has been heard on the "subject what the provisions in the application are. If you should "come to the conclusion from all the evidence applicable to the "subject that it contained a provision that the building should be "used as a hotel within 60 days; then the plaintiff would not be "entitled to recover, because when the building was burned it was "not operated as a hotel.—This is all I am inclined to say on that "subject.

"There is a question made about the title of the property. "The evidence shows the legal title was in the plaintiff from the "other gentlemen—owners with him. That is enough unless you "believe from the evidence that he holds that title for the benefit "of Roodhouse and Edwards. If he does, then he would not be "entitled to recover, for the policy provides that he must be full and "absolute owner of the property in order to recover the insurance.

"As to reasonable time I will say to the jury, that if there "was no statement in the application as to the time in which the "building was to be used as a hotel, in that case it was the duty of "the plaintiff to operate it as a hotel or have it used as a hotel, in "a reasonable time, and the question of reasonable time is for you "to determine.

"I believe there is a provision in the policy that no powder "or combustible material be placed in the building while insured. "If the jury should believe from the evidence that the plaintiff "Wright or his authorized agent authorized powder or other com- "bustible material to be placed in the building, that would vitiate "the policy and render it void."

Upon these instructions and the refusal to give the instructions as requested, the questions involved in the case arise.

POINTS.

I.

It may be assumed that the language of the policy and of the application agreed, and was simply that the building was "to be occupied for hotel purposes", the evidence being conflicting as to whether a limitation of 60 days was in the application (the application having been lost). The jury under the instruction of the

court must have found that no limitation was put in the application and that finding is conclusive.

Greggs v. Moss, 14 Wall 564.
Express Co. v. Ware, 20 id. 543.
Mills v. Smith, 8 Wall 27.
Woodruff v. Hough, 91 U. S. 596.
(Record 116–118.)

II.

The language of the policy and the application is then to be assumed to be as follows: "In consideration, &c., * * * "the Fire Ass'n of Philadelphia do insure David Wright against "loss, &c., * * on his two-story adobe and wood stuccoed "shingle roof hotel building to be occupied for hotel purposes and "situated", &c., and this does not import a warranty, but is rather a representation of an expectation of future condition. Such a representation would not affect the policy unless fraudulently made.

Kimball v. Aetna Ins. Co., 9 Allen 540.
Herrick v. Union Mut. F. I. Co., 48 Me. 558.
Catlin v. Springfield Ins. Co., 1 Sumner 434.
Doliver v. St. Joseph's F. M. I. Co., 131 Mass. 39.
National Bank v. Ins. Co., 95 U. S. 673.
Rice v. N. E. M. Ins. Co., 4 Pick 439.
Dennistoun v. Lillie, 3 Blighs 202.
Hough v. City F. Ins. Co., 29 Ct. 10.

III.

If the language of the policy imports a warranty, it is a "promissory warranty" and the assured had a *reasonable time* in which to comply with its requirements. (Cady v. Imperial Ins. Co., 4 Clifford 203. James v. Lycoming Ins. Co., id. 272.) And this question of reasonable time turned upon the circumstances of the case, some of which were disputed (Record 115 and 98) and the court ruled correctly in submitting the question to the jury. That where there are qualifying circumstances or disputed questions of fact the question of reasonable time is one for the jury, seems to be well settled to be the rule in insurance cases.

Gloucester Mnfg. Co. vs. Howard Fire Ins. Co., 5 Gray 497.
West Branch Ins. Co. v. Halfenstein, 40 Pa. St. 289.
Continental Ins. Co. v. Lippold, 3 Neb. 391.
Ward v. Law Property Assurance Co., 4 W. R. 605.
German Ins. Co. v. Curran, 8 Kans. 9.
Edwards v. Baltimore Ins. Co., 3 Gill. 176.
Providence Life Ins. Co. v. Martin, 32 Md. 310.
Davis v. Western Mass. Ins. Co., 8 R. I. 277.

Lindsay, Jordan & Co. v. Union Mut. I. Co., 3 R. I. 157.
Palmer v. St. Paul F. & M. Ins. Co., 44 Wis. 201.
Ben Franklin Ins. Co. v. Flynn, 98 Pa. St. 627.
Murdock v. Chenango Co. Mut. Ins. Co., 2 Comstock 200.

The same principle also holds good in other cases where circumstances exist which affect the question.

Howe v. Huntington, 15 Me. 350.
Holbrook v. Burt, 22 Pick 46.
Magee v. McCormic, 13 Ill. 289.
Union N. B. of Ch. v. Baldenwic, 45 Ill. 375.
Haywood v. Harmon, 17 Ill. 477.
Kennedy v. Gibbs, 15 Ill. 406.
Scott v. Buchanan, 11 Humph. 468.
Union Bank v. Ezell, 10 Humph. 385.
Porter v. Patterson, 15. Pa. St. 232.
Goodwyn v. Chevely, 4 Hurlst and North 640 (Bramwell dissenting).
Fry v. Hill, 7 Taunt. 377.
Facey v. Hividom, 3 B. & C. 213.
Burton v. Griffiths, 11 M. & W. 817.
Conger v. Hudson, R. R. R. Co., 6 Duer. 375.
Green v. Haines, 1 Hilton 254.

IV.

Notice of loss and proofs of loss were submitted within a reasonable time, and the delay in transmitting proofs of loss, was excused so that the whole matter was for the jury. (See Record 67 and 65–71.)

Swan v. Liverpool, London & Globe Ins. Co. 52 Miss. 704.
Palmer v. St. Paul Ins. Co., 44 Wis. 201.
Ben Franklin Ins. Co. v. Flynn 98 Pa. St. 627.
Edgerly v. Farmers Ins. Co. 48 Iowa, 644.
Butterworth v. Western Assurance Co., 132 Mass. 489.
Aetna Ins, Co., v. Schnue 85 Ind. 366.
Blake v. Exchange Mut. Ins. Co. 12 Gray, 264.
Franklyn Ins. Co. v. Chicago Ins. Co. 36 Md. 102.

V.

The evidence tended to show that no gunpowder or other combustible material was ever placed on the premises by authority, or with the knowledge of, defendant in error or any agent of his. This was a question for the jury, and was properly left to them by the court.

VI.

Whether powder was in fact in the building at the time of the fire, was also a question of fact for the jury. The evidence on that subject was not of sufficient force to make it a necessary inference, from the evidence that powder was *kept* on the premises by any one, and the finding of the jury is conclusive.

ARGUMENT.

I.

That we are correct in assuming that the phraseology of the application and of the policy in regard to the intended occupancy of the premises was in substance the same, and that no limit of time was provided, within which the insured building should be occupied for hotel purposes, will appear from a very slight inspection of the record.

1 It will be seen that the policy itself contained no limitation. (Record 49.)

2 The application was lost, and plaintiff below testified that there was no representation as to time, and that the application and the policy were the same; the application "contained no statement at all with reference to the occu- "pancy of the hotel, only that it was to be used as a hotel." (Record 116.)

3 It appeared in evidence, that the hotel was just completed when the policy issued; that it was unfurnished and unoccupied, and that it would take six months to procure the furniture and supplies necessary to start, and hence the claim by plaintiffs in error, that it was to be occupied in 60 days for hotel purposes was improbable.

It is true the plaintiff in error had the testimony of two witnesses, namely J. L. Dargan, agent of plaintiff in error, who testified to the loss of the application, and that it contained the following question.

"Are the premises entirely under the control of occu- "pant and for what purpose? If not, give full particulars "as to its occupancy and control."—and that it was answered as follows: "To be occupied within 60 days as "a hotel by the tenant."

T. B. Mills, an agent of the company, who testified that the application contained a provision that the building was to be occupied as a hotel within 60 days.

Here then was a conflict. It is no matter where the weight of the testimony was on this question. It is not an open question whether this Court will look into the evidence to see whether the jury has made a mistake.

Gregg v. Moss, 14 Wal. 564, Express Co. v. Ware, 20 Id. 543, Mills v. Smith, 8 Wall. 27, Woodruff v. Hough, 91 U. S. 596, are cited from among numerous cases, showing the extent to which this court has gone in its scrupulous regard for the province of the jury.

II.

Assuming then that the policy contains the only stipulation between the parties in relation to occupancy, to wit: that the insured building was "to be occupied for hotel purposes" and that there was nothing further on that subject, we submit that it is a fair construction that the parties could have only intended this as a reservation for the benefit of the assured or a representation only of expectation as to future condition.

It is well settled that policies, drawn as they are, by the insurance companies are to be construed favorably to the assured. In National Bank v. Ins. Co., 95 U. S. 673, wherein was a policy containing nearly the same stipulations about representations being warranties, &c., in view of the amplitude of language in the policy not only with reference to warranty, but with reference to false representations, fraud, &c., vitiating the policy—it was considered uncertain as to what the intention was as to imposing a warranty and that when a policy is so framed the construction which imposes a warranty will not be favored.

It can not be fairly argued that the parties certainly intended this as a warranty that this building should be occupied for hotel purposes.

When the policy was written, the building was unoccupied excepting by two persons who kept watch over the hotel. Can it be said in the absence of testimony, that there would be less risk to the building while occupied as a hotel than while under the special care of two men? On the other hand, it might well be considered as a proper precaution on the part of the assured, to reserve to himself the right to have the building occupied for hotel purposes, a risk generally considered as hazardous. If this was not in the minds of the parties, what is more reasonable than that the whole intention was to represent what the *expectation* of the assured was? It does not seem to be clear upon the face of the policy and under the circumstances of the case, that there was an intention to enter into contract to occupy this building for hotel purposes.

The view that the language used only imports a reservation or a representation of an expectation, is supported by a similar view taken in some well considered cases.

In *Hough vs. City Fire Ins. Co., 29 Conn. 10*, the survey embraced in the application contained the following interrogatory and answer:

"How are the several stories occcupied?" Answer: "Unoccupied, *but to be occupied by a tenant.*" The policy contained the usual stipulation about the representations in the application being deemed a part of the policy, and a warranty on the part of the assured. It was held that the answer was not to be considered as a stipulation that the house should be occupied by a tenant, but rather *as a reservation on the part of the applicant, of the right to have it so occupied, and to avoid the inference that it was to remain unoccupied. In Dollivir et al, v. St. Joseph F. I. Co., 131 Mass. 39*, the policy contained this statement, "*Used for the storage of ice.*" When the policy was issued there was no ice in the building, and the language used was, in view of that fact, the same as if it had read, "*to be used for the storage of ice.*" It was held not a warranty but as description. Necessarily it referred to an intention to use the building for the same purposes that it had been used for.

In *Herrick v. Union Mutual Ins. Co., 48 Me. 558*, the application contained the the following question and answer:

"Who owns and occupies the building?"—Answer: "Owned "by applicant; *to be occupied by a tenant.*"

This was held to be a representation of *an expectation*, and not a warranty, citing *Rice v. N. E. M. Ins. Co., 4 Pick. 439*, which was a case where the master of a vessel writing for insurance to the agent stated that *the vessel would sail on the 12th*, and the agent so represented. It was held that this was a mere *expectation*. In Denistoun v. Little, 3 Bligh supra the language of the letter requesting insurance was as follows: "The *Brilliante* will sail on "the 15th of May—a receiving vessel—in which the writer of this "will take passage." The *Brilliante* had in fact sailed. It being in time of war, the fact of the vessel having already sailed was held material. The Lord Chancellor said he considered this as going beyond an *expectation*—recognizing the view that had it related only to the future movements of the vessel, it would have been considered a representation of expectation merely. In *Catlin v. Springfield F. I. Co., 1 Sumner 434*, a case often cited and always with approval, the language in the policy was as follows:—"*at present occupied by one Joel Rodgers as a dwelling house but to "be occupied hereafter as a tavern and privileged as such*", and it was held not to be a warranty, but a reservation. Other cases with more or less bearing upon this question might be cited but we believe that the foregoing authorities fairly sustain and are sufficient to justify our position.

III.

If this is to be construed as a warranty, then it seems to be clear that it is to be construed as a *promissory* warranty—a distinction well taken and elaborately argued in *Cady v. Imperial Ins.*

Co., 4 Clifford 203 and in *James v. Lycoming Ins. Co., idem 272.*

That in this view the assured would have "*a reasonable time*" in which to occupy or to procure the occupancy of the insured building for hotel purposes, is not denied. That the question of reasonable time in a case like this is for the jury, appears to be clear both upon reason and authority.

Reasonable time in this case depended on many circumstances; the time when the parties who were under contract to occupy it, first refused to carry out their agreement; the season of the year; the difficulty in procuring tenants; the difficulty in procuring furniture; and the time it would take to procure it —were circumstances that actually entered into the question, and must have been within the minds of the parties, if this was in fact a stipulation to put the building to hotel uses. The rule that the court, for the sake of certainty, will, wherever there has been a mere lapse of time, treat the question as one of law, does not apply, and we believe never has been applied to a case like the one at bar.

Lord Mansfield in *Tyndal v. Brown, 1 Term R. 16*, said: "Whenever a rule can be laid down in respect to reasonableness, it should be decided by the court, and adhered to by every one for the sake of certainty."

It needs no argument to show that a rule can not be laid down to cover such cases as this case. The authorities do not sustain the view that where there is no conflict in the evidence, the question becomes one for the court if the circumstances are of such a character that a certain rule can not be applied. This question was ably discussed by Judge Shippen in *Howe v. Huntington, 15 Me. 350.* The question arose in a case of contract, where each party was to do certain acts upon the happening of a certain event, and no time was fixed. Reviewing the authorities, that learned jurist found the rule to be, that in giving notices in regard to negotiable paper, in regard to tenants, and in many cases of a general nature and prevailing usage, the judges will decide; but "where "there is no certain time limited within which or from which a "thing is to be done, but is to be accommodated in some degree to "the interests of the party and the course of trade, as in the case of "bills *at sight* or notes on *demand*, or where it may in some man-"ner depend on the state of the weather, as in the case of removal "of goods distrained, or the tithing of a crop, it has been left to "the jury to decide upon each case as it arises."

Thus in case of life tenancy, the reasonable time in which to remove goods after termination of tenancy, has been held to be a question of law.

(Stoden v. Harvey, Cro. Jac. 204.,Co. on Lit. 566.)

So of notice to quit, to tenant at will, (Ellis v. Paige, 1 Pick 43.) While in cases of bills payable, or after sight, or on demand the

holder has a reasonable time in which to present for payment which is a jury question. (Field v. Nickerson, 13 Mass. 13.) So also a tithe owner has a reasonable time to compare the tithe set out with the other nine tenths, which is a jury question. *Jacey v. Hardin, 3 B. & C., 213.* So also a landlord has a reasonable time to remove distrained goods. (Pitt v. Shaw, 4 B. & Ad. 206.) Abbott C. J. in Smith v. Doe, 2 B. & C. 270, puts the rule as Lord Mansfield has stated where it can be applied with certainty in cases of prevailing usage, but in cases "*which may depend on particular* "*facts and circumstances (he says) the assistance of a jury may be* "*required.*"

Starkey says: "Where the law does not by the operation of "any principle or established rule decide upon the legal quality of the "simple facts, it is for the jury to draw the general inference of rea- "sonable or unreasonable. Starkey's Ev., 453.

On the ground that where circumstances affect the measure of reasonableness, it becomes a question of fact for the jury, it was held in *Magee v. McCormic, 13 Ill. 289*, that whether a bill of a broken bank was returned in reasonable time was a question for the jury; in *Union National Bank of Chicago, v. Baldenwic, 45 Ill., 375* that reasonable time to return counterfeit money is a question for the jury, in which the court say it is because it depends "*upon the situation of the facts and circumstances of the particular case;* in *Bell v. Nims, 51 Ill, 171 and Kennedy v. Gibbs, 15 Ill. 406 that* under a statute which allowed interest in cases of "*unreasonable and vexatious delay,*" in *Bank v. Ezell, 10 Hump 385*, the question being one of *reasonable notice* of non-payment, where the bill was indorsed after due; in Scott v. Buchanan, 11 Hump. 468, the question being whether a person, after arriving at his majority, had, within a reasonable time, exercised his right to rescind a contract entered into while he was under age; these questions were held to be for the jury. In the case last cited, the court say: "as to "the time within which a party may exercise this right of election, "*no uniform rule could be established without prejudice to the right itself* "What would be considered as a very reasonable and proper time in "one case, might well be considered as unreasonable and unnecessary "in another, owing to a difference in the condition and situation "of the parties, in reference to the right to be affected by the ac- "tion." In *Porter v. Patterson, 15 Pa. State 232* the court held that whether a consignee had expressed his dissent within a reasonable time to his consignor, who had departed from instructions in a sale of goods, was a question for the jury; citing many cases. Without further citation from the numerous cases in this subject, we think we are warranted in our position that upon principle, the question of reasonabe time in this case was properly left to the jury, it being a case depending on its own peculiar circumstances.

(2dly.) The authorities clearly sustain the view that in cases similar to the one at bar, the question of *reasonable time* has almost uniformly been left to the jury.

In *Hough vs. City Fire Ins. Co., 29 Conn. 10, Supra*, where the application provided that the insured premises were "*to be occupied by a tenant*," the court instructed the jury, that as no time was specified when such occupancy was to commence, "*the warranty* "(*if a warranty*) *would not be broken if such occupancy* "*was procured within* a reasonable time," and this instruction was approved, Judge Sanford saying, "in some cases indeed, the court decides, but those are "cases in which it can be determined by a simple application "of some rule or principle of law, to facts proved or admitted at "the trial; *but where the law is silent and does not by the operation* "*of any principle or established rule decide upon the legal quality* "*of the simple facts it is for the jury to draw the inference of reason-* "*able or unreasonable* in point of fact.

In *West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289*, the policy provided that notice of loss must be given *forthwith* to the secretary of the company. The fire occurred Oct. 4. The defendant in error went to see the agent the same day, but he was not at home and was not seen. The local agent however, was informed of the fire and wrote the secretary on Wednesday next after the fire. The secretary came in a day or two, and defendant in error was, through the local agent by direction of the secretary, told to make out his proofs of loss, and that he would be paid.

The court instructed the jury that it was for them to find whether the notice had been given within a *reasonable time*, and it was held to be a proper instruction. In *Edwards v. Baltimore F. I. Co., 3 Gill. 176*, the question whether notice of loss under a policy having similar provisions, was given in reasonable time was left to the jury and approved. In *Continental Ins. Co. v. Lippold, 3 Neb. 391*, the fire occurred on the 16th of April '71. A few days afterwards defendant in error requested the local agent to notify the company. He informed defendant in error that he had seen the general agent and had a conference with him; on the 15th of July, '71, defendant in error employed one Doerfelt to write to the general agent stating the loss, which was done. On the 16th of August the general agent wrote defendant that there were suspicious circumstances which he ought to explain. On Jany. 1st, '72, formal proofs of loss were given. The question whether notice of loss was given within a reasonable time, was left to the jury and this was held to be no error.

In *Germania Ins. Co., v. Curran, 8 Kans. 9*, the policy contained a provision that notice of loss must be given *forthwith*.

There was no direct evidence of service of notice. The local agent however gave information of the loss within 48 hours. The question whether this information was given within a reasonable time was left to the jury and approved.

In *Providence Life Ins. Co. v. Martin 32 Md. 310*, which was an action on an accident policy, requiring immediate notice, &c., it appeared that the local agent resided in the vicinity of the accident, but was then absent at Berkly Springs where he heard of it. Within less than a week the widow reported to the agent; made affidavit on the 18th of August, another on the 28th and another on the 4th of September, which were forwarded when made—and the question of reasonableness of the notice was left to the jury. It was held that the question was properly submitted, citing *Edwards v. The Buttman Fire Ins. Co. 3 Gill 176 (supra.)*

In Davis, Hacket & Co. v. Western Mass. Ins. Co. 8 R. I. 276, the action was in a fire insurance policy. The goods were injured by fire April 22, '62. Proofs of loss were given May 31, '62. No reply was made by the company, until the 19th of June when the proofs were objected to.

It was left to the jury to say whether *this reply* was within reasonable time which was approved. The rule laid down by Lord Mansfield was stated, but the court says "there are numerous cases "depending on particular facts and circumstances, in which the "court can not dispense with the aid of a jury", citing *Howe v. Huntington, 15 Me. 350 supra.*

The case of *Lindsly, Jordan & Co. v. Union Mutual Ins. Co., 3 R. I. 157*, is directly in point. In the application the description as to situation and surroundings of the insured building referred to two small adjacent buildings and provided that "both of the above buildings are to be moved 15 feet." A loss occurred before the buildings were moved. The question whether reasonable time had elapsed in which to move the buildings was left to the jury—and the court on review held the submission to the jury proper, saying: "The question of reasonable time is always a question of "fact excepting in those cases in which the law has established "what is to be considered reasonable time. In a case like this "to wit the reasonable time required to remove two buildings no "such reasonable time is, or can be established by law. The nature "of the case involves an inquiry as to facts, and *reasonable infer-"ences as to the state of facts in the case.*

"In cases where the law raises an inference from a state "of facts, the facts being found, the law is to be pronounced by the "court, but in cases where the law raises no such inference *the "reasonable consequence or effect of a state of facts is as much a "matter for the jury to consider as is the existence of the facts them-"selves.*"

In Ben Franklin Ins. Co. v. Flynn 78 Pa. St. 627, the proofs of loss were not furnished until 30 days after the loss.

The policy required that they be furnished as soon as possible, and it was held that the question whether this was within reasonable time, was properly submitted to the jury, citing Ins. Co. v. Davis, idem 280, where three months had elapsed and the question was submitted to the jury.

There are some cases where, there being no dispute about the facts, and no circumstances tending to excuse delay, the question has been treated as one for the court.

Murdock v. The Chemung Co. Mutual Ins. Co. 2 Comst. 210, sometimes cited on this question was decided on the ground that the question of waiver was, upon the evidence improperly submitted, and a new trial was granted on that and other grounds not really involving a question of reasonable time. *Jewett J.* thought if it was involved it was a question for the jury.

The case of *Edwards v Lycoming Insurance Co., 75 Pa. St. 378*, was decided upon the point that the question of a waiver of service of notice of loss was improperly submitted. It did not in any proper sense involve the question under discussion. Without further special reference to this class of authorities we desire to say that upon a careful examination we have found nothing that amounts to conflict of authority upon the question as presented by the evidence in this case.

IV.

No special point was made in the court below, that notice of loss was not served in time; but if this court considers the point saved, by the request that the court charge, as a matter of law, that plaintiff was not entitled to recover, we submit the following considerations;—In the correspondence had with Dargan by direction of plaintiff in error, Dargan states that *he sent notice of loss immediately after the fire*. It is of no consequence whether this was done by direction of defendant in error. The cases cited,(supra), are authority for this view. We call attention especially to the following cases:

Ben Franklin F. I. Co., v. Flynn, 98 Pa. St. 627.
Edwards v. The Baltimore F. Ins. Co., 3 Gill 176.
Providence Life Ins. Co., v. Martin, 32 Md. 310.
Germania Ins. Co. v. Curran, 8 Kans. 9.
Continental Ins. Co. v. Lippold, 3 Neb. 391.
West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289.
(And see other cases cited under our 4th point supra.)

The proofs of loss were delayed under the supposition which was really a fact, that Dargan, who was investigating the fire, had collected and forwarded to the company, at the home office, proofs of loss. The proofs that were afterwards prepared, were prepared and forwarded at the request of Dargan, acting for the company. To have directed a verdict, for defendant below, on this state of

the case, upon the evidence, would have been error. There was at all events something to go to the jury.

V.

The evidence was specific on the part of plaintiff below, that no gunpowder or other combustible material was, to the knowledge of the plaintiff, ever kept in the insured building, (Record 114.); also to the effect that the plaintiff below never gave any one authority to keep gunpowder or other combustible material. *Lusigman* does not state that he had any right to keep powder on the premises, and it would appear that his occupancy was not such as would give him any implied right to do so.

The cases which hold that the policy is rendered void by the keeping of gunpowder without the knowledge of the assured, are cases, where, by leasing, or by mortgaging, the assured had given a legal right to the tenant or mortgagee in possession, to use the premises for purposes forbidden in the policy, so that there was a sort of constructive assent on the part of the assured. It is at all events, pretty clear that where there is no such relation between the assured and any person bringing the forbidden article on to the premises, as to make the assured responsible for the act, or the continuance of the act, the policy would not be rendered void by the mere fact that gunpowder was brought upon the premises,

In Rhode Island it has been held, that a replication that the premises were used for hazardous purposes without the knowledge or assent of the assured, is good.

Hoxie. v. Providence Mut. Ins. Co., 6 R. I. 517.

In every case where a policy has been held to be invalidated by the acts of a tenant or some person representing the assured notwithstanding assured did not know of such use, it will be found that there was a *using* of the premises in a business sense. The language of the policy in this case is, "*if in said premises there be kept* gunpowder." There is not a particle of evidence that gunpowder was "*kept*" in any such sense as must have been within the mind of the parties.

Buchanan v. Exchange Fire Ins. Co. 61 N. Y., 26.

At all events, whether this condition of the policy was broken, was a question of fact for the jury.

It is well settled, that when the conditions of a policy have been broken, by devoting the property to uses prohibited in the policy, the policy does not thereby become a dead instrument, that the uses to which the property was devoted *at the time of the loss* is to determine the questien whether the condition has been broken.

Mutual Fire Ins. Co. v. Coalsville Shoe Factory 80 Pa. St. 375.

The evidence was not such as to make it a necessary inference that gunpowder was *kept* in the premises. *Lusigman* testified-

that while he was at work on the building, he occupied a room where he had his carpenter bench, and that when the hotel was completed he slept in it and kept his tools and baggage there, also that in December 1881 he quit sleeping there, and that at the time of the fire he had removed *one* tool chest, but the balance of his baggage was there. He says while there, (*but does not say when*), that he, without the knowledge of Mr. Wright, took two small cans of Du Pont powder, and a quarter of a can of blasting powder to the hotel; that this powder had been wet, was caked and in lumps; and that he threw out the small cans and put the can (quarter full) of blasting powder in his chest; that he had also some giant powder and a part of a coil of fuse; that he gave this giant powder away except 4 sticks, which he left on a window sill in an adjoining room, and at the time of the fire he had removed one tool chest, (Record 55.) It would seem, therefore, that he had left 4 sticks of powder in a room which he did not pretend to have any right to occupy, and he was a mere trespasser in leaving it there. As to the rest of the powder, it was in his chest and he had removed one chest. There was no evidence of any explosion or sign of powder in that room, and the jury could tell better than we can, whether the powder was in the chest that was removed, or was in the chest that remained. Aside from this there was the testimony of *John M. Ginn* that he saw a powder keg carried out, but that he did *not know whether there was any powder in it*.. (Record 78.)

Chas. A. Newton testified that he was at the fire and found a keg of powder, known as black powder, also a coffee sack containing 8 or 10 sticks of giant powder. This was not the same powder mentioned by Lusigman. At all events the jury were not bound to believe it was the same. The description is not the same. It does not appear where it was found. The evidence of Wright being considered, the jury had a right to believe that this powder was brought onto the premises by some one having no shadow of right to do so. It appears that this building was in a mining country—that powder was in common use—and that it was common to have powder even at hotels.

The jury had a right on this state of facts, to determine whether powder had been "kept at the hotel" contrary to the condition of the policy. They were the judges whether there had been a breach of the covenant in this respect. Boos v. World Lf. Ins. Co., 3 T. & C. 364 (N. Y.). Aurora Fire Ins. Co. v. Eddy, 50 Ill. 106.

We have made no reference in argument to the question of ownership, because it is not disputed that defendant in error had the legal title, and the testimony of defendant in error, being that his ownership was absolute, it will hardly be contended that the question was not for the jury.